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No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CHARLES S. FOLTZ, *et al.*,
Petitioners,

v.

U.S. NEWS & WORLD REPORT, INC., *et al.*,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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APPENDIX A

United States Court of Appeals
For The District of Columbia Circuit

Nos. 87-7151 to 87-7153.

Charles S. FOLTZ, et al.,

Appellants,

v.

U.S. NEWS & WORLD REPORT, INC., *et al.*

Charles S. FOLTZ, *et al..*,

John KIRBY,

Appellant,

v.

U.S. NEWS & WORLD REPORT, INC., *et al.*

David B. RICHARDSON, et al.,

Appellants,

v.

U.S. NEWS & WORLD REPORT, INC., *et al.*

Argued Oct. 3, 1988.
Decided Jan. 13, 1989.

Appeals from the United States District Court
for the District of Columbia
(Civil Actions No. 84-00447 and 85-02195)

Before EDWARDS, BUCKLEY and WILLIAMS, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* WILLIAMS.

STEPHEN F. WILLIAMS, *Circuit Judge:*

Appellants are former employees of U.S. News & World Report, Inc. All retired between 1974 and 1982. At their retirements, U.S. News exercised its option to purchase the shares in the company that each had received as part of a stock bonus program. In addition, the U.S. News Profit-Sharing Plan issued retirement benefits to each of them, computed on the basis of their proportional interests in U.S. News stock held by the Plan (virtually its sole asset). The stock was not publicly traded, and in valuing the relevant stock interests for both purposes, the defendants treated them as minority interests, rather than including a "control" premium.

The gap between minority and majority valuation proved great because U.S. News, through a subsidiary (Madana Realty), owned a 3.8-acre parcel of real estate in a rapidly developing office district in Washington, D.C., known as the West End. The company used more than half of this land for employee parking, III Joint Appendix ("J.A.") 1044, and carried it on its books at a fraction of its market value. *Foltz v. U.S. News & World Report, Inc.*, 663 F.Supp. 1494, 1503 (D.D.C.1987).

U.S. News annually engaged American Appraisal to value the company's stock for purposes of exercising its option to buy the holdings of retiring employees. American Appraisal almost entirely discounted the potential value of the real estate, at least until 1981, because its talks with the company's management convinced it that development plans remained remote and speculative. 663 F.Supp. at 1502-03.

The Plan in turn used American Appraisal's share valuation in calculating the severance benefit to be paid to employees who retired, died, or separated from U.S. News in each year.

The sale of all of U.S. News's stock in 1984 revealed the significance of these valuation decisions, exposing an

immense gulf between the per share realizations of the plaintiff retirees and the beneficiaries of the company's sale. The total sale price was $176 million, or $2,842 per share. Employees who were in active service at the date of the sale, and who held U.S. News stock interests either directly or through the Plan, benefited accordingly. So did company directors, through what the litigants call "phantom stock" holdings[1]—in essence, bonuses in the form of promises by the company to pay the recipient at retirement the per share value of the company's stock at that date, multiplied by the number of "phantom" shares issued to the director.[2] By contrast, valuations for the plaintiff retirees ranged from $65 per share in 1973 to $470 in 1981.

In the district court the plaintiff retirees claimed that the defendants' valuation decisions (along with related statements or omissions) breached fiduciary duties imposed by the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001, *et seq.* (1982) ("ERISA"), and violated

---

[1] Officers as such may also have received phantom shares. The record is unclear. Though phantom shares were evidently conceived as a device for rewarding and encouraging persons who could not hold stock, the record is confusing as to who fell into this category. *Compare* III J.A. 953 (directors may not buy stock); Appellee's Br. at 5 n. 4 (only directors got phantom shares); and 663 F.Supp. at 1508 (neither directors nor officers may buy, giving no citation for proposition), *with* U.S. News Certificate of Incorporation, Article Fifth, ¶ 1 (employees may buy stock), and *id.* at Article Fifth (a) (employee defined to include directors *and* officers).

[2] The phantom share program had a ceiling of 2400 shares per director. In 1981, part of the period in which share prices increased rapidly, the directors accelerated the award rate in a manner which had the effect of ensuring that every director, including the new President and Treasurer, who had two and one years of service respectively, reached the 2400-share cap before the sale. This put each director in line to receive about $7 million at the sale price of $2,842 per share. In fact, however, the directors ultimately redeemed their phantom shares at a "price considerably less than" that paid for ordinary stock. See 663 F.Supp. at 1508.

the securities laws.[3] They brought claims against the Plan, the company, Madana Realty, and American Appraisal and also against several former directors of U.S. News (as directors and as Plan fiduciaries). See 663 F.Supp. at 1498 n. 3 (listing individual defendants). The trial court ruled for defendants on each count of the complaints. We affirm.

Our analysis proceeds through these steps:

1. U.S. News's purchase of stock from retiring employees were clearly purchases of minority interests and, under Article Fifth (e) of its Certificate of Incorporation, could not have been valued otherwise.

2. For the Plan's computation of retiring employees' interests in the Plan's U.S. News stock, the governing Plan document directed the Plan to use "the fair market value established" under Article Fifth (e). That valuation technique, further, accorded with one of the key purposes of the Plan—to perpetuate employee ownership of the company. Thus minority valuation complied with the explicit directive of the Plan document and also tended to fulfill its general purposes.

3. As ERISA instructs fiduciaries to carry out the aims of the Plan that they administer, it did not prohibit the fiduciaries' action. Nothing in ERISA contradicts the directive of the Plan document or the congruence of minority valuation with its purposes.[4]

I. U.S. NEWS'S EXERCISES OF ITS PURCHASE OPTION

A 1962 reorganization of U.S. News created two classes of shares, Common and Class A. All shares of both classes

---

[3] The securities claims are based on alleged nondisclosure by the defendants of the basis on which the valuation was made. We find no error in the trial court's rejection of this claim on the facts. See below at p. 20.

[4] Our holding on these issues makes it unnecessary for us to reach the statute of limitations defenses.

had equal voting rights. The only difference was that Class A shares had a non-cumulative dividend preference of $2.00 per share per year and could be held only by the U.S. News Profit-Sharing Plan. III J.A. 936. Class A shares were designed to convert automatically to Common if they were acquired by anyone other than the Plan. U.S. News Certificate of Incorporation, Article Fourth (d)(ii).

As part of the 1962 reorganization, those employees who owned shares in the predecessor corporation were issued a total of 108,000 shares in the new company. About two-thirds of the shares in the predecessor company had belonged to the company's founder, David Lawrence, and to his family; the company purchased these shares for cash and for notes that it repaid by 1967.

After the reorganization, employees could acquire additional direct ownership of shares only through U.S. News's stock bonus plan. All employees were eligible to participate. I J.A. 168. U.S. News gave bonus shares to employees in the fifth year of their employment, and every five years thereafter. It calculated the dollar value of the shares to be awarded according to a consistent formula: the longer an employee's length of service, and the greater his salary, the larger the dollar value of the quinquennial bonus. U.S. News then divided this dollar figure by the current appraised value of a share to arrive at the number of bonus shares it would award the employee that year.

In order to keep the beneficial ownership of the company lodged among its active employees, Article Fifth of the U.S. News Certificate of Incorporation required employees to offer to sell their shares back to the company if the employee left for any reason, including retirement. The option price was to be established by an independent appraiser, according to a procedure spelled out in Article Fifth, paragraph (e):

> (e) *Option Price.* The option price of stock shall be its fair market value as of the date of exercise of the option. . . .
>
> Fair market value as of any date shall be the fair market value agreed upon by the parties, or in the absence of such agreement, determined as follows: The board of directors of the corporation shall select each year a qualified appraiser of national standing, who shall, as soon after the close of each fiscal year of the corporation as complete financial statements are available, determine the fair market value of the stock of the corporation as of the close of such fiscal year. *Such fair market value shall be determined without regard to the restrictions on transfer of stock contained in this Article. In making such appraisal the appraiser shall use methods and standards recognized by the regulations of the United States Internal Revenue Service as appropriate for determining fair market value of corporate stock.* . . . The market value per share so determined shall be the option price . . .

Article Fifth (e), III J.A. 918-19 (emphasis added). Article Fifth (e) also included a procedure by which aggrieved employees could contest the appraisal, but the parties agree that no employee invoked it during the period over which plaintiffs retired. Appellants' Joint Br. at 8, Appellees' Joint Br. at 25. Between 1962 and the retirement of the last retiring plaintiff, U.S. News always exercised its Article Fifth (e) purchase option. 663 F.Supp. at 1500-01.

Although plaintiffs make a game try, it seems quite plain that U.S. News acted properly in adopting a minority valuation for the small lots of bonus stock that it purchased from employees. Article Fifth (e) gives the appraiser two instructions on the subject. The appraiser is to assume that the stock could trade freely (i.e., ignore the fact that the Certificate of Incorporation limited stockholders' power of alienation), and to "use methods and standards recog-

nized by the regulations of the United States Internal Revenue Service as appropriate for determining fair market value of corporate stock." Neither point provides any basis for valuing on a majority basis lots that were obviously minority.

The parties and the trial court all agreed that whatever enlightenment is available from the IRS was embodied in Rev.Rul. 59-60, 1959-1 Cum.Bul. 237, and in the cases interpreting this pronouncement on the valuation of stock for estate tax purposes. We shall revisit Rev.Rul. 59-60 and those cases shortly, but for present purposes it is enough to say that no one here even argues that it could require assignment of a control premium to non-control stock.

Plaintiffs argue that because Article Fifth (a) defines "stock" as comprising both Class A and Common stock, it follows that the phrase "stock of the corporation," as used in Article Fifth (e), must refer to all the company's stock and that the entirety of its stock would necessarily entail control. Support for the notion that the valuation is to encompass all of the company's stock lies in the fact that Class A stock could be held only by the Plan, not by an individual, so that the phrase in Article Fifth (e) seems to encompass stock that in the nature of things would never be directly covered by the purchase option. We think the reading very strained. Plaintiffs suggest no reason whatsoever why the framers of the clause could possibly want minority shares valued on a majority basis.

Other circumstances also cut against such a reading. It is clear from the Certificate of Incorporation and is conceded by plaintiffs that the framers of the arrangement sought to perpetuate employee ownership and control. Valuation on a majority basis would be inconsistent with the implicit assumption that the company would *not* be sold, as a control premium is in the nature of things realized only at the moment of sale. In addition, the liquidity prob-

lems that plaintiffs' reading might engender for the company could imperil continued employee ownership.

Rejecting plaintiffs' strained reading of Article Fifth, we conclude that U.S. News quite properly valued the stock bonus shares on a minority basis.

The plaintiffs further argue that even if valuation of the shares on a minority basis was proper, the huge discount that American Appraisal applied to the potential value of U.S. News's West End real estate was unreasonable. After reviewing the testimony of the expert witnesses, the district court found that American Appraisal's decision to give some, but very limited, weight to the value of the real estate "adequately took account of the Company's underlying assets." 663 F.Supp. at 1531. We find no error here. In view of U.S. News's often-stated unwillingness to develop the West End real estate, a purchaser of a minority interest in the company would likely have drastically discounted the possibility of a change of mind. And only a decision to develop the real estate in the fairly near future would enable it to contribute very substantially to the discounted present value of the expected returns on a minority share of U.S. News stock. See *Citizens Bank & Trust Co. v. Commissioner of Internal Revenue*, 839 F.2d 1249, 1251, 1254 (7th Cir.1988) (discussing propensity of investors to heavily discount future returns, especially those beyond their control). *Cf. Estate of Watts v. Commissioner of IRS*, 823 F.2d 483 (11th Cir.1987) (arms-length transaction would value interest in partnership at "going concern value" not higher "liquidation value" when liquidation was unlikely and interest transferred did not carry power to force liquidation).

II. VALUATION OF PROFIT-SHARING PLAN SHARES:

The Plan's Mandate

All employees with one or more years of service participated in the Profit-Sharing Plan and thereby enjoyed

a derivative interest in the Plan's U.S. News stock. Their interests vested fully after ten years' employment. 663 F.Supp. at 1501. Although each Member had an individual "account" representing his or her share of the Fund, the Plan Document clearly defined each participant's interest as "the value of his *undivided* share" of the Fund. III J.A. 926 (emphasis added).

The Plan purchased 30,000 Class A shares in 1962 on the occasion of its creation and U.S. News's reorganization. At the time that amounted to about a 23 percent interest in the company. 663 F.Supp. at 1500. Although U.S. News continued to issue stock bonuses thereafter, repurchases evidently exceeded issuances; in any event, the Plan's percentage of outstanding stock gradually increased. In 1966 it bought 20,000 more Class A shares (at $80 a share), bringing its holdings to 50,000 shares, or 45 percent of the 110,574 shares then outstanding. *Id.* at 1501. In 1971 the Plan's 50,000 share block became a majority of U.S. News's outstanding shares. *Id.* The relative size of the Plan's block continued to grow. By April 1975, for example, employees' direct holdings were only 17,444 shares. III J.A. 935.

The Plan document explicitly provided that, for purposes of computing a departing employee's retirement benefit, the Plan Trustee should use "the fair market value established under Article Fifth, Paragraph (e)" of U.S. News's Certificate of Incorporation:

> *For all purposes of the Plan*, the market value of shares of stock of the Employer, which are held by the Trustee as a part of the Fund, *shall be the fair market value established under Article Fifth, Paragraph (e), of the Certificate of Incorporation of U.S. News & World Report, Inc.* . . . The Committee shall be fully justified and exonerated in relying on the figures so provided by the Board of Directors and/or the appropriate financial or accounting officer of the

> Employer, and the Trustee shall be fully justified and exonerated in relying on the figures so provided by the Committee, as to the accuracy of the figures and as to the compliance with the aforesaid provisions of the Certificate of Incorporation.

Profit-Sharing Plan, Art. VI, § 6.3, III J.A. 924-26 (emphasis added).

Each year the Plan in fact used the per share dollar value that American Appraisal had computed for U.S. News under Article Fifth (e). The plaintiffs agree that the Plan cross-referenced the Certificate of Incorporation, and that therefore as a matter of trust and contract law the fiduciaries were right to adopt the company's valuation; as we have seen, however, they thought that the latter should have been on a majority basis. Our rejection of the latter view of course dooms their claim that *the Plan document* required valuation on a majority basis. It is true that the Plan's reference to each participant's "undivided" share in the whole suggests that the Plan's assets could have been totalled up—on a majority basis—and then apportioned to each employee in pro rata shares. But the Plan's express direction to accept the valuation made by the company for purchase of bonus stock—a direction not merely conceded but embraced by plaintiffs—clearly controls over any emanations from the choice of these terms for description. As a matter of contract and trust law, therefore, the Plan correctly used a figure computed on a minority basis.

III. THE EFFECT OF ERISA

We turn now to the plaintiffs' argument that if the Plan be construed to permit valuation on a minority basis, it violates ERISA. The parties agree that the Plan is subject to ERISA, which preempts state law governing employee benefit plans (with limited exceptions not relevant here). See ERISA § 514, 29 U.S.C. § 1144 (1982); *Pilot Life*

Insurance Co. v. Dedeaux, 481 U.S. 41, 54, 107 S.Ct. 1549, 1556, 95 L.Ed.2d 39 (1987) (ERISA's civil enforcement remedies in § 502(a), 29 U.S.C. § 1132, are exclusive). Thus ERISA frames the duties that the Plan's management owned participants. ERISA creates a cause of action for benefits due, whether under the terms of the Plan itself or because some term of the Plan conflicts with ERISA. *Pilot Life, supra.*

While trust documents cannot excuse trustees from ERISA duties, *Central States, SE & SW Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 568, 105 S.Ct. 2833, 2839, 86 L.Ed.2d 447 (1985), rights under ERISA are largely defined by the plan document, *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511, 401 S.Ct. 1895, 1900, 68 L.Ed.2d 402 (1981). Plaintiffs claim to find in ERISA, however, three sources of a duty to use a majority valuation, strong enough in their view to overcome the terms of the U.S. News Plan: (1) an implied incorporation of IRS valuation techniques, which in their view compelled valuation on a majority basis; (2) ERISA's mandate that a plan fiduciary "discharge his duties . . . solely in the interest of the participants and beneficiaries," ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1); and (3) ERISA's requirement that it file an annual report containing a statement of its assets and liabilities "valued at their current value," ERISA § 103(b), 29 U.S.C. § 1023(b)(3)(A) (1982). We work through them in that order.

Internal Revenue Service rules. Although ERISA at no point relevant here incorporates the Internal Revenue Code or IRS regulations, courts have on occasion found the regulations of useful guidance in addressing problems under ERISA that parallel issues under the Code. See, e.g., *Tulley v. Ethyl Corp.*, 861 F.2d 120, ___ (5th Cir.1988); *Rose v. Long Island R.R. Pension Plan*, 828 F.2d 910, 917-18 (2nd Cir.1987) (adopting IRS definitions of "agency" and "instrumentality" into ERISA); see also *Alessi*, 451 U.S. at 517-21, 101 S.Ct. at 1903-05 (interpreting ERISA pro-

vision against discrimination in pension plans as endorsing view taken in Treasury regulations and IRS rulings applying Internal Revenue Code's parallel non-discrimination requirement for plans to qualify for favorable tax treatment). We will assume potential relevance here and consider the possible import of Rev.Rul. 59-60.

The ruling unquestionably suggests that control may justify higher valuations for a specific block of shares:

> The size of the block of stock itself is a relevant factor to be considered. Although it is true that a minority interest in an unlisted corporation's stock is more difficult to sell than a similar block of listed stock, it is equally true that control of a corporation, either actual or in effect, representing as it does an added element of value, may justify a higher value for a specific block of stock.

Rev.Rul. 59-60 at § 4.02(g), 1959-1 Cum. Bul. 237, 238-39.

In the estate tax context for which Rev. Rul. 59-60 was drafted, the courts have taken the view that valuation of a decedent's control block of shares should include a control premium. This applies even though the will itself may split the control block among legatees. See *Estate of Curry v. United States*, 706 F.2d 1424, 1428 (7th Cir.1983) (applying control valuation to decedent's *non-voting* shares because of his ability to sell them as a block with voting shares). It thus represents a decision that for estate tax purposes control at the moment before death calls for imputation of a control premium even if death and the will or intestacy will destroy control. In that context, as *Curry* pointed out, any other rule would enable decedents to artificially reduce estate taxes by splitting interests in anticipation of the legatees' reassembling them. *Id.*; see also *Citizens Bank & Trust Co. v. Commissioner of Internal Revenue*, 839 F.2d 1249 (7th Cir.1988); *Ahmanson Foundation v. United States*, 674 F.2d 761, 767-69 (9th

Cir.1981). Moreover, the estate tax is ordinarily conceived as falling on the decedent's passage of property, not upon the legatees' receipt. See, e.g., *Ahmanson Foundation,* 674 F.2d at 768.

Here the reigning conception is quite different. As we noted in our original consideration of Article Fifth (e) of the Articles of Incorporation, the architects of U.S. News's 1962 reorganization, which included the Plan, saw as a major objective the establishment and perpetuation of employee ownership. *Foltz,* 663 F.Supp. at 1500; see also U.S. News's Articles of Incorporation, Article Fifth at 7-12, III J.A. 916-21. A control premium is realized by sale of a controlling block of stock; the trial court found that the Plan fiduciaries believed that they were not going to make such a sale, and that finding is supported by ample evidence. So long as they expected to carry out the Plan's employee-ownership purpose, it seems clear that the context underlying valuation of the Plan's shares was diametrically opposed to that of the estate tax.

We pause to note some tension between this conclusion and some of the explanations for the very existence of control premiums. A leading analysis argues that bidders offer a premium for control because it will enable them to eliminate or reduce "agency costs"—the costs associated with the managers' failure to realize the maximum value of the firm's assets. See, e.g., Michael C. Jensen and William H. Meckling, Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, 3 J.Fin.Econ. 305, 308-10, 329, 351-52 (1976); see also Saul X. Levmore, A Primer on the Sale of Corporate Control, 65 Tex.L.Rev. 1061 (1987). There is some irony in allowing plan fiduciaries—who here overlap largely with corporate management—to deny retiring employees the benefit of firm assets that *could have been* realized by management's pursuing a course of conduct that was clearly available—and the availability of which induced the ultimate purchaser to pay a control premium for all the company's stock.

Ultimately, however, we are not persuaded that this view of control premiums undermines our conclusion. In the first place, the existence of a control premium should not be conceived as necessarily proving the incumbent managers delinquent: the winning bidder's readiness to offer a premium may stem from its possession of special assets or skills that are uniquely able to enhance the firm's value, and the costs of identifying the synergistic opportunity may have been lower for the winning bidder than for anyone else. Second, even if the control premium is due to incumbent management's lack of acumen, the law provides a remedy for extreme cases—albeit only extreme cases, as the business judgment rule allows the firm's managers great leeway.

Most important, however, is that where the controlling instruments contemplate employee ownership, all participants are on notice that maximization of the firm's pecuniary value is not to serve as an exclusive goal. The market for corporate control provides incumbent management a critical incentive to perform well: inadequate performance will induce outsiders to bid for control of the company and to oust them. See *Edgar v. MITE Corp.*, 457 U.S. 624, 633, 102 S.Ct. 2629, 2636, 73 L.Ed.2d 269 (1982) (noting congressional finding that "takeover bids . . . serve a useful purpose in providing a check on entrenched but inefficient management"); see also *id.* at 643-44, 102 S.Ct. at 2641-42 (recognizing that tender offer mechanism gives management incentive to perform well). To the extent that the investor-workers establish a preference for employee ownership, they blunt the operation of the market for corporate control and diminish the force of its incentive effects.

Accordingly, we see no reason why the courts' quite appropriate use of Rev.Rul. 59-60 for estate tax valuations should preclude a plan's use of minority valuation where the Plan document so provides and where the controlling instruments effect a clear preference for employee own-

ership. The Fifth Circuit has observed that plan fiduciaries do not breach their ERISA duties merely because they fail to follow Rev.Rul. 59-60 "jot and tittle," *Donovan v. Cunningham,* 716 F.2d 1455, 1473 (5th Cir.1983), *cert. denied,* 467 U.S. 1251, 104 S.Ct. 3533, 82 L.Ed.2d 839 (1984), and we think the point entirely apt here.

Thus we find no error in the district court's conclusion that, as applied to this Plan, Rev.Rul. 59-60 does not require a majority valuation. See 663 F.Supp. at 1525-29.

The fiduciaries' "exclusive" duty to provide benefits: The retirees rely heavily on ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1) (1982), which requires a plan fiduciary to:

> discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—
>
> (A) *for the exclusive purpose of:*
>
> (i) *providing benefits to participants and their beneficiaries;* and . . .
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;
>
> . . . .
>
> (D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [ERISA].

29 U.S.C. § 1104(a)(1) (1982) (emphasis added).

The retirees read the italicized phrase as meaning that the Plan fiduciaries had a duty to maximize pecuniary benefits; moreover, they believe that such a duty would invalidate Plan decisions that, effectively, favored later dis-

tributees over earlier ones such as themselves. Both steps of the argument fail.

Section 404 creates no exclusive duty of maximizing pecuniary benefits. Under ERISA the fiduciaries' duties are found largely in the terms of the plan itself. See *Alessi*, 451 U.S. at 511, 101 S.Ct. at 1900; see also *Edwards v. Wilkes-Barre Pub. Co. Pension Trust*, 757 F.2d 52, 56-57 (3d Cir.1985). In using a minority basis for stock valuation, the fiduciaries here sought to pursue the Plan's goal of continued employee ownership. As we have already noted, the control premium is normally realized *by sale*, an event that would obviously thwart one of the Plan's purposes—perpetuation of employee ownership. Moreover, while obviously evaluation on the basis of a *hypothetical* sale could co-exist with employee ownership, it could create liquidity problems that would jeopardize that purpose. ERISA, far from manifesting any intention to discourage long-term employee ownership, specifically favors that pattern by exempting Employee Stock Ownership Plans from ERISA's 10 percent cap on plans' holdings of "employer securities." See 29 U.S.C. § 1107(b)(1) (1982) (exempting any "eligible individual account plan," which is defined in *id.* § 1107(d)(3) as including ESOPs). See also *Donovan v. Cunningham*, 716 F.2d 1455, 1465-67 (5th Cir.1983). While U.S. News's Plan was not an ESOP, see 663 F.Supp. at 1518 n. 33,[5] ERISA's evident approval of ESOPs precludes any claim that it forbids employee ownership as a legitimate plan objective.

Further, even if we supposed that § 404 called for exclusive pursuit of pecuniary advantages for plan beneficiaries, the disputed valuation decisions are consistent with such an aim. The plaintiffs were not the only beneficiaries of the Plan. Plan wealth that was not distributed to them

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[5] U.S. News's Plan itself was apparently exempt from the 10 percent cap by virtue of 29 U.S.C. § 1107(d)(3)(A)(ii), including profit-sharing plans as eligible individual account plans.

was available for distribution to other Plan beneficiaries. Indeed, the worst that can be said of the Plan is that it was administered to favor a rolling class of future beneficiaries over those present and past. Nothing in § 404 requires that one set of beneficiaries be favored over another. See, e.g., *Edwards*, 757 F.2d at 56-57.

Plaintiffs would also infer from § 404(a)(1)(B)'s requirement that plan fiduciaries exercise the "care, skill, prudence and diligence" of a "prudent man" that we owe their valuation decision no deference, since, they say, the fiduciary standard exacted is "the highest known to law." In support of this view they cite *Donovan v. Cunningham*, 716 F.2d 1455 (5th Cir.1983), *cert. denied*, 467 U.S. 1251, 104 S.Ct. 3533, 82 L.Ed.2d 839 (1984), and *Donovan v. Bierwirth*, 680 F.2d 263 (2d Cir.), *cert. denied*, 459 U.S. 1069, 103 S.Ct. 488, 74 L.Ed.2d 631 (1982). In fact, however, courts have reviewed ERISA fiduciaries' decisions as to the allocation of benefits among beneficiaries by an "arbitrary or capricious" standard so long as the decisions involved no conflict of interest. See, e.g., *Bruch v. Firestone Tire & Rubber Co.*, 828 F.2d 134 (3d Cir.1987), *cert. granted*, ___ U.S. ___, 108 S.Ct. 1288, 99 L.Ed.2d 498 (1988); *Edwards*, 757 F.2d at 56; *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325, 333-34 (3d Cir.1984).

Plaintiffs appear to recognize that principle as governing application of the "arbitrary or capricious" standard, but argue that the fiduciaries were subject to a conflict because they sought to continue ownership of U.S. News by its employees. But that interest was not some "outside" concern; rather, by the terms of the Plan, it was an interest that Plan beneficiaries shared, inseparable from their interests in the Plan itself. This contrasts sharply with *Cunningham*, where the plan fiduciaries (identical with the firm's board of directors) used plan assets to buy stock from one of their number (chairman of the board of directors and until the purchase the firm's sole shareholder),

allegedly at inflated prices, and with *Bierwirth*, where the fiduciaries and firm insiders acted to defeat a tender offer for the firm's shares that, if successful, would have markedly increased the value of the plan's assets but have jeopardized their personal positions. It is also clearly distinct from the facts of *Pilon v. Retirement Plan for Salaried Employees of Great Northern Nekoosa Corp.*, 861 F.2d 217 (9th Cir.1988), where the court, apparently assuming that more generous payments to a particular retiree might ultimately come from the corporate treasury, see *id.* at 219, noted that "divided loyalty" increased the likelihood that a decision would be found arbitrary and capricious, *id.* at 219.

In any event, as we regard the fiduciaries' reading of the Plan document as correct and as not countermanded by anything in ERISA, application of even the severest type of scrutiny would not lead us to overturn it.

Plaintiffs further invoke *Maggard v. O'Connell*, 671 F.2d 568, 571 (D.C.Cir.1982), for the proposition that to satisfy even the "arbitrary or capricious" test an ERISA trustee must have taken a "hard look" at salient problems and engaged in "reasoned decisionmaking." We have some hesitation about a wholesale incorporation of administrative law doctrine into judicial review of fiduciary decisions, and note that the issue at stake in *Maggard* was a factual one—whether an applicant for benefits had worked in coal mines for the requisite number of years. In any event, while it is true here that the Plan fiduciaries here never recorded any deliberations and appear to have pursued the minority-basis valuation more on the basis of inertia than explicit decisionmaking, that is no basis for overturning a decision that is entirely consistent with the Plan document and with ERISA's substantive requirements.

ERISA's reporting requirements: § 103(b) of ERISA requires all ERISA plans to publish an annual report containing a statement of the plan's assets and liabilities

"valued at their current value." 29 U.S.C. § 1023(b)(3)(A) (1982). Section 3(26) of ERISA in turn defines "current value" as

> [1] fair market value where available and [2] otherwise the fair value as determined in good faith by a trustee or a named fiduciary . . . pursuant to the terms of the plan and in accordance with the regulations of the Secretary, assuming an orderly liquidation at the time of such determination.

29 U.S.C. § 1002(26) (1982). The Plan, of course, valued itself on a minority basis, while the liquidation value, arguably, would be computed on a majority basis.

Since the terms of the Plan by no means contemplated a liquidation, § 103(b)'s directive to "assum[e] an orderly liquidation" is to a degree inconsistent with the requirement of valuation "pursuant to the terms of the plan." Moreover, as § 103(b) is a reporting requirement, we are far from clear that it applies at all to benefit calculations. In any event, assuming the defendants' benefit calculation method deviates from that of § 103(b), we think such a deviation permissible so long as the fiduciaries have not concealed from the beneficiaries the critical facts that expose the possible deviation. Here there was no concealment. The evidence introduced below demonstrates beyond doubt that all employees were aware, or at the very least were on inquiry notice, as to the great gap between the book value of U.S. News's West End real estate and its true value. To take just one example, this disparity was often discussed—though not always at great length—at the annual employee lunch. Written transcripts of these discussions between employees and management were available on request to all employees who were unable to attend. 663 F.Supp. at 1510. As there was no concealment, and as the Plan in good faith reported one measure of its "fair value," we were unable to find an ERISA violation in any

possible deviation of the Plan's benefit calculation from the methods appropriate to § 103's reporting requirements.

* * *

The filings below are reputed to be the largest in any civil case in the history of the district court for the District of Columbia. The district court threaded its way through the maze with patience and skill. We affirm on all counts.

SO ORDERED.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civ. A. Nos. 84-0447, 85-2195.

Charles S. FOLTZ, *et al.*,

Plaintiffs,

v.

U.S. NEWS & WORLD REPORT INC., *et al.*,

Defendants.

David B. RICHARDSON, *et al.*,

Plaintiffs,

v.

U.S. NEWS & WORLD REPORT, INC., *et al.*,

Defendants.

June 22, 1987.

MEMORANDUM OPINION

BARRINGTON D. PARKER, Senior District Judge:

This memorandum opinion sets forth the Court's final ruling on the claims of former employee shareholders of U.S. News and World Report, Inc. ("U.S. News" or "Company") to proceeds from the sale of the corporation. The Company was purchased in 1984 by Mortimer Zuckerman, a Boston real estate developer, for a price of $176 million. Plaintiffs contend that during the period prior to the sale, when they were entitled to and did receive their share of the value of the Company's stock, the true worth of the stock was wrongfully concealed, that its appraised value was otherwise manipulated and miscalculated by defendants, and that they were deprived of the stock ben-

efits and profit-sharing interests to which they were entitled. The litigation has been hotly contested. Serious and unsettled questions arising under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, are involved in this proceeding. While other legal issues are also presented under federal securities law, and the common law of fraud, breach of fiduciary duty, unjust enrichment and negligence, the questions arising under ERISA clearly predominate.

Throughout the course of the proceeding, counsel have ably briefed and argued in both their written memoranda and oral presentations the factual and legal issues involved. The questions presented for resolution have been fully considered. For the reasons set forth below in its factual findings and conclusions of law, entered pursuant to Fed.R.Civ.P. 52(a), the Court determines that plaintiffs have failed to support their claims, that judgment should be granted defendants on all counts, and the consolidated complaints dismissed.

I. INTRODUCTION

Course of the Litigation

The Complaints and Pretrial Motions

This litigation involves two consolidated complaints brought against U.S. News and several other defendants. Charles S. Foltz and others are plaintiffs in the first; David B. Richardson and others are plaintiffs in the second. At all relevant times, the Company produced and published the weekly news magazine, *U.S. News and World Report.* The Company also operated book and newsletter divisions; they were not particularly profitable and are of no great consequence to these proceedings.

Foltz, conditionally certified as a class action, presents the claims of some 230 former U.S. News employees. *See Foltz v. U.S. News & World Report, Inc.*, 106 F.R.D. 338

(D.D.C.1984). The class includes all persons who retired or were otherwise separated from employment with the Company during the eight-year period from 1974 through 1981, other than several former directors who have been specifically excluded upon a finding that their interests were not typical of the class. Mr. Foltz and seven other named plaintiffs are the designated representatives for the class period. The *Richardson* action is brought by former employees who retired or separated from U.S. News in 1982.[1] During their employment, the plaintiffs in both actions participated in the U.S. News Profit-Sharing Plan ("Plan"). They were also beneficial owners of stock in the Company under its stock bonus plan. Upon retirement or separation, they liquidated their Plan accounts and redeemed their stock interests. In both actions, plaintiffs seek recovery of benefits they claim are owned them by virtue of an alleged undervaluation of the Company's stock during the class period.

Defendant U.S. News, organized at all relevant times under the corporate laws of the State of Delaware,[2] is headquartered in the District of Columbia. Other named defendants are certain former directors of U.S. News;[3] the

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[1] Unless otherwise noted, the phrase "class period" shall be deemed to cover the period included in both the *Foltz* and *Richardson* complaints.

[2] On September 30, 1985, a plan of reorganization was completed that transformed the Company into a limited partnership. The plan was carried out in the aftermath of the Company's 1984 sale to Mr. Zuckerman and has been the subject of a supplemental complaint brought in this proceeding. *See* 640 F.Supp. 1184 (D.D.C.1986).

[3] The director-defendants are John Sweet, Samuel Keker, Marvin Stone, William Dunn, Lester Tanzer, John Tuohey, Raymond Naimoli and James McIlhenny. Mr. Sweet succeeded U.S. News founder David Lawrence as Chairman of the Board and served in that capacity throughout the class period.

U.S. News and its former directors are collectively referred to as the U.S. News defendants.

Madana Realty Company ("Madana"), a wholly-owned U.S. News subsidiary; the U.S. News Profit-Sharing Plan, an employee benefit plan as defined by ERISA § 3(34), 29 U.S.C. § 1002(34); and American Appraisal Associates, Inc. ("American Appraisal"), an appraisal firm transacting business in the District and organized under the laws of the State of Delaware. American Appraisal performed the year-end appraisals of the U.S. News stock that are at issue here. A group designated as Save the Fund was allowed to intervene as defendants. The group includes currently employed or recently separated or retired U.S. News employees interested in preserving and eventually receiving that portion of the sale proceeds held back from distribution from the Plan by order of this Court.[4]

Over the three-year period during which these consolidated proceedings have been pending, discovery efforts have been thorough and extensive. Even so, many of the factual and legal issues originally presented were significantly narrowed by pretrial proceedings and motions for summary judgment.[5] By agreement and consent of all counsel, issues of liability and damages were bifurcated for separate trial.

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[4] The *Foltz* plaintiffs moved for a preliminary injunction against distribution of the sale proceeds in August 1984, which relief was denied upon receipt of assurances from defendants that plaintiffs and the Court would be given notice in advance of any intended distribution. Such notice was given in January 1985 and was followed in February by a renewed motion for preliminary injunction. The Court again denied the motion initially, 608 F.Supp. 1332 (D.D.C.1985), but upon review the Court of Appeals, 760 F.2d 1300 (D.C.Cir.1985), ordered a partial holdback of funds. 613 F.Supp. 634 (D.C.C.1985). Upon motion of the *Richardson* plaintiffs, the Court held back an additional sum. Order of July 15, 1985. The funds subject to the two injunctions together total approximately $47.5 million, exclusive of accrued interest.

[5] Prior decisions of this Court granted defendants partial summary judgment as to a number of the claims originally brought by plaintiffs. *See* 639 F.Supp. 595 (D.D.C.1986) (*Richardson*) and 627 F.Supp. 1143 (D.D.C.1986) (*Foltz*).

The claims remaining after entry of partial summary judgment in each case were considered in an extended bench trial. The matters remaining in *Foltz* included: (1) claims for benefits due and owing from the Plan, under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B);[6] (2) claims for breach of fiduciary duty against U.S. News, the director-defendants and American Appraisal, under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3);[7] (3) claims against U.S. News, the director-defendants, and American Appraisal for violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 of the Securities and Exchange Commission, 17 C.F.R. § 240.10b-5;[8] (4) claims for common-law fraud against U.S. News, the director-defendants, and American Appraisal; and (5) claims for common-law breach of fiduciary duty, unjust enrichment, negligence and negligent misrepresentation against U.S. News and the director-defendants.

The matters remaining in *Richardson* included: (1) claims for benefits due against the Plan under ERISA §

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[6] Section 502(a)(1)(B) provides that a participant or beneficiary of a plan may bring an action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan[.]"

[7] Section 502(a)(3) allows a plan participant, beneficiary or fiduciary to bring an action for equitable relief to enforce the terms of the plan in question and of the statute, to enjoin violations thereof, and to obtain redress for such violations.

[8] Section 10(b) of the 1934 Act makes it unlawful for anyone

> [t]o use or employ, in connection with the purchase or sale of any security . . ., any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe. . . .

Commission Rule 10b-5 makes it unlawful for persons to engage in deceptive, fraudulent, or misleading practices in connection with the purchase or sale of securities. Subsection (b) prohibits persons from making false or misleading statements, or from omitting to state certain facts "necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading. . . ."

502(a)(1)(B); and (2) claims against U.S. News and the director-defendants for negligence and negligent misrepresentation.

At the conclusion of plaintiffs' case-in-chief on the issue of liability, defendants filed motions for dismissal and judgment, pursuant to Fed.R.Civ.P. 41(b). In addition to opposing those motions, plaintiffs in the two actions filed motions to amend their complaints, under Fed.R.Civ.P. 15(b), on the theory that the facts actually litigated tended to support additional causes of action. The motion to amend the *Foltz* complaint was denied. The *Richardson* plaintiffs were granted leave to add section 502(a)(3) ERISA claims against the U.S. News defendants for their alleged failure to have the Plan's holdings of U.S. News Class A stock properly appraised.[9] In an oral bench ruling, the Court granted in part defendants' motions, thus limiting the claims in both proceedings to those against the Plan for benefits due under ERISA § 502(a)(1)(B) and against U.S. News and the director-defendants for breach of fiduciary duty under section 502(a)(3) and for negligence. *See* Transcript of Proceedings, vol. 54 at 10,316-36.[10] All claims against American Appraisal were dismissed. An extended discussion of the ruling is presented *infra* pp. 25 ff.

As discussed above, plaintiffs in the consolidated actions seek to recover retirement benefits allegedly owed them under the Company's profit-sharing and stock bonus plans. Because ERISA affords an aggrieved plaintiff a right of

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[9] The motion of the *Richardson* plaintiffs was prompted by an invitation, extended by the Court in its summary judgment decision, to seek leave to add such a claim at trial. *See* 639 F.Supp. at 608. The Court's subsequent bench ruling also reinstated a number of claims that had been previously ruled time-barred on summary judgment.

[10] All subsequent references to the transcript of trial proceedings are cited in the following form: (vol). Tr. (page(s)). Plaintiffs' and defendants' exhibits are referred to as PX—and DX—, respectively. Defense exhibits used only in *Richardson* are designated RDX—.

action against a covered plan, plaintiffs brought an action for unpaid benefits directly against the Plan. With respect to their bonus stock interests, however, they must and they do seek recovery of monies allegedly owed them from U.S. News itself.

In addition, plaintiffs charge that the director-defendants, in concert with American Appraisal, acted both deliberately and negligently to cause their retirement benefits to be undervalued. Accordingly, plaintiffs seek recovery in the alternative from those defendants.

In the discussion that follows, the Court presents, pursuant to Rule 52(a), Fed.R.Civ.P., the basic and controlling facts developed during the liability phase of the trial, including the relevant history and operation of U.S. News. In then turns to a legal analysis of the claims and contentions advanced by the parties.

II. FACTUAL FINDINGS

History of U.S. News and World Report, Inc.

A. Events Occurring Before the Class Period

U.S. News & World Report, Inc. was formed on June 1, 1962 from the reorganization of the U.S. News Publishing Corporation ("U.S. News Publishing"), a Company established in 1933 by David Lawrence. Prior to the 1962 reorganization, all voting stock of U.S. News Publishing was held by Lawrence's three adult children, subject, however, to a voting trust, controlled by Mr. Lawrence as sole voting trustee. The non-voting stock was held in part by two trusts established for the benefit of Lawrence family members, and in part by certain employees who had been afforded an opportunity to buy stock. By 1962, 28 employees or members of their families owned 34 percent of the outstanding shares of the 1933 corporation.

The 1962 reorganization was undertaken with the intent and purpose that U.S. News would be owned entirely by

its employees. Mr. Lawrence and the Company's Washington, D.C. counsel, the firm of Covington & Burling,[11] took the necessary steps to achieve that end, including an independent appraisal of the fair market value of the corporate shares and the submission of a request to the Internal Revenue Service that the proposed reorganization would not result in the loss of the tax-qualified status of the Plan, which Mr. Lawrence had established prior to 1962. The U.S. News Certificate and Articles of Incorporation ("Articles of Incorporation") also assured that the Company would remain employee-owned. Article Fifth, PX 2 at 7-12. Under the reorganization plan, U.S. News purchased the shares of U.S. News Publishing held by members of the Lawrence family at a price of $50 per share, determined by an appraisal performed by American Appraisal as of May 31, 1962. Consideration was paid partly in cash and partly in notes. Employees who individually held stock, in U.S. News Publishing exchanged their stock for shares in U.S. News equivalent in value to what they had previously owned. The value of the U.S. News shares received by the employee stockholders was also determined to be $50 per share by the May 31 appraisal. U.S. News then sold to the Plan 30,000 shares of stock, again at a price of $50 per share.

After the reorganization, U.S. News had two classes of stock, "Class A" and "common." Each class had the same voting and liquidation rights. All Class A stock was owned by the Profit-Sharing Plan, and the stock would automatically be converted to common stock if it passed into the hands of anyone other than the Plan.

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[11] Mr. Don Harris, a Covington & Burling partner, was immediately involved in developing the reorganization plan and the necessary papers and documentation. Lamentably, he is the only person who, at this late date, is able to testify as to events surrounding the reorganization. His testimony was not opinion or expert in nature, but rather he offered historical testimony on matters of objective fact. He did not construe any documents in a legal sense.

Immediately following the reorganization, 130,800 shares of U.S. News stock were outstanding: 30,000 shares of Class A stock were held by the Profit-Sharing Plan, and 100,800 shares were held directly by the employees who had previously owned stock in U.S. News Publishing. The 30,000 shares purchased by the Plan constituted approximately a 23 percent interest in U.S. News. It was contemplated, however, that the Plan would own a larger percentage with the passage of time and that it would eventually own nearly all the outstanding stock. This was so because shares owned by the 28 key employees would be redeemed as they reached the retirement age of 65, with each redemption increasing the Plan's percentage of the reduced amount outstanding, until ultimately the Plan would own all but the relatively small number of common shares.

In 1966, the Plan purchased an additional 20,000 shares of Class A stock at a value of $80.00 per share, again determined by American Appraisal. This gave the Plan approximately 45 percent of the 110,574 shares then outstanding. During 1971, the 50,000 shares came to constitute a majority of the outstanding stock of the company, due to the repurchase by the company of outstanding common stock from employees who retired, died, or otherwise terminated their employment.

The reorganization plan did not contemplate any change in the actual control and management of the company, since all the common stock was placed in a voting trust with Lawrence as sole voting trustee. Thus, as sole voting trustee, he had the legal authority to elect the directors, both before and after reorganization. Mr. Lawrence served in that position until his death in 1973, at which time substitute trustees were named, in accordance with the voting trust instrument. In 1967, the Plan's Class A holdings were placed in the voting trust as well.

The persons responsible for the reorganization anticipated that employee ownership of U.S. News would take several forms: (1) the 28 employees who had been stockholders of U.S. News Publishing would hold shares of U.S. News & World Report ("key employee stock"); (2) since more widespread ownership by employees was desired, the Plan, in which most of the employees participated, would hold all the Class A stock; (3) the Company would institute a "stock bonus" program, issuing shares to employees every fifth year.

The U.S. News Profit-Sharing Plan provided income to employees upon their retirement, death, or separation from U.S. News.[12] Each employee who had attained the age of 25 and who had served for at least one year was entitled to participate. An employee became fully vested in the Plan after 10 years' service. The Plan was the primary means through which each employee secured an ownership interest in the Company. The employees could not, without the financial resources of the Plan, purchase all of the stock of U.S. News Publishing previously held by members of the Lawrence family. Thus the Plan's purchase of U.S. News stock permitted all employees to participate in the beneficial or economic ownership of the Company even though they did not have legal title to any shares individually. The Plan was always regarded as a conduit through which employees generally could participate in the growth of the Company. Benefits statements instructed Plan participants how to calculate the number of shares equivalent to their undivided interests in the Plan. *See, e.g.*, DX 94, 95. In addition to the Class A stock, the assets of the Plan also included other investments made with funds received in the form of cash contributions from U.S. News. The value of those investments is not at issue here.

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[12] An employee could normally elect either to receive a lump-sum payment, to have an annuity purchased on his behalf, or to leave his account to ride with the future investment fortunes of the Plan.

Under the stock bonus program, common stock was issued to employees at five-year intervals beginning after the fifth anniversary of employment, and in amounts based on salary and length of service and on the appraised value of the Company's stock. The stock bonus program was thought to have psychological advantages over indirect ownership through the Plan, although each employee's bonus stock holdings were of a much lesser value than his Plan account.

In 1968, Mr. Lawrence instituted a deferred compensation program under which a specified number of shares of "phantom stock" were awarded to certain senior Company executives. The program was designed to give senior managers a greater incentive for superior performance. That program is discussed further, *infra* pp. 1508-09.

Because the stock of U.S. News was not publicly traded, it was necessary to determine the value of the stock—for the purpose of awarding and redeeming the bonus shares—by appraisal. In addition, because the Plan's major asset was a 50,000 share block of Class A stock, such appraisals were necessary to determine the value of the Plan's assets each year, in which value separating employees shared ratably when they settled their account balances.[13] The bonus and Class A shares were always valued equally.

B. Events Occurring During the Class Period

1. Real Estate Acquisitions

At the time of the 1962 reorganization, Madana had acquired three to four acres of partially developed real estate in the West End of Washington. Madana owned the land until late 1981, and approximately 75-80 percent of the holdings were used for U.S. News business oper-

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[13] An employee settling his Plan account or redeeming his bonus stock in a given year would do so on the basis of the stock's value as of the close of the previous year.

ations, including a headquarters building, an employee cafeteria, and employee parking facilities. 26 Tr. 5089 (Sweet); 31 Tr. 6272-73 (Naimoli). The remaining portion was subject to commercial leases to third parties.

Before 1973, development of the real estate was not feasible because of zoning uncertainties, the character of the neighborhood, and the pendency of various proposals that would have required public use of portions of the land. *See, e.g.*, DX 118 at 2; PX 371 at 2. During the early 1970s, U.S. News and other West End property owners actively participated in proposing to local government officials a coherent development plan. In December 1974, the District of Columbia Zoning Commission promulgated zoning law revisions, changing a substantial portion of the Company's holdings from commercial to commercial-residential, while increasing the permissible "floor area ratio ("FAR").[14] The remainder of its property continued to be zoned residential. U.S. News was not wholly satisfied with some aspects of the Commission's decision, for example, height restrictions on certain residential real estate adjacent to Rock Creek Park. Challenges to the rezoning decisions generally, including the height restriction, and lawsuits by other dissatisfied landowners continued for years after the decision was rendered, through late 1977.

In any event, during 1974 and immediately thereafter, the Company had no definite development plans for the real estate. While its directors and management were aware of the potential value of the real estate, they had no intention of selling those assets at that point in time. The appraiser who performed the year-end valuation for 1974, Mr. C.E.O. Walker, called as a witness by the *Foltz*

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[14] "Floor area ratio" is the figure which expresses the total gross floor area as a multiple of the area of the building lot (or parcel). This figure is determined by dividing the gross floor area of all buildings on a lot by the area of that lot. In other words, a greater permissible FAR allows the owner to build more densely on his property.

plaintiffs, offered convincing testimony and cautioned, as an experienced professional, that any realizable value should be attributed to the real estate only "if it was evident that the controlling interest had a firm and clear intent to dispose of the real estate within a very short or reasonable period of time[, that is,] absolute evidence. . . .not mere development plans." 23 Tr. 4524. *See also* 23 Tr. 4505-12. Mr. Walker was highly qualified to give this opinion. He had previously served as international president of the American Society of Appraisers and was also a member of the College of Fellows of that organization. 23 Tr. 4493-95.

In February 1976, the Oliver T. Carr Company, a reputable real estate development firm, responded to a request to provide advice on the development potential of the U.S. News' real estate and the construction of a new headquarters facility. The Carr report and study noted that there were many possibilities for development of the property, but at the same time commented that the ultimate choice as to the character and timing of any project would depend on such unpredictable factors as market conditions and the Company's corporate objectives. The Carr Company completed construction documents for a proposed headquarters building, following which U.S. News consulted with architectural planning and space design firms in anticipation of building. Nevertheless, no firm construction commitments materialized under the project development agreement with Carr.

In 1977, U.S. News management further explored with officers in the mortgage and trusts department of Riggs National Bank the financial feasibility of developing its real estate. Riggs advised that the Company's financial condition was not sufficiently strong and cautioned against undertaking any significant real estate developments at the time. On the strength of that advice, the Company deferred further consideration of building a new corporate headquarters and of pursuing any other development plans.

Management discussed its hesitancy about immediate development with the employees, explaining further that if such developments were undertaken, they wanted to be certain that they would protect the Company from uncertain swings in its publishing-related business and assure source of profits from which contributions could be made to the Plan. *See, e.g.*, PX 11 at 23, Question and Answer Session ("Q & A") at 2.[15]

In early 1978, U.S. News again discussed real estate development plans with Carr Company representatives. Several alternatives were considered including development of part of the land, a partnership arrangement with a developer, and relocation of U.S. News headquarters elsewhere. These alternatives did not materialize into binding development plans.

During the class period the U.S. News directors kept American Appraisal fully informed of all real estate acquisitions and their considerations regarding development of the property. American Appraisal representatives were familiar with the location, size and use of the property; knew that the property had great potential and unrealized value; and discussed in their annual interviews with U.S. News officers the plans and considerations regarding possible development.

The working papers of the appraisers referenced contemplated developments of the property as presented in the 1976 Carr report. Their subsequent work papers and annual reports leading up to the 1981 joint partnership agreement with Boston Properties, Inc. likewise reflected full knowledge and awareness of those important events.

However, until the development plans matured into a firm and clear intent to build within a reasonably certain

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[15] The question and answer session referred to was one of many that took place at the annual shareholder luncheons held throughout the class period. PX 11 is the transcript of the 1978 meeting.

time frame, the realizable value of the real estate was not reflected in American Appraisal's annual reports or the Company's financial statements. This approach was supported by credible testimony of representatives from American Appraisal. *See, e.g.*, 23 Tr. 4505-12, 4524 (testimony of C.E.O. Walker). When more precise decisions were reached and it became certain that plans and discussions had ripened and definite goals and timetables were set, these facts were reflected in the annual valuations performed by American Appraisal in the last several years of the class period. In interviews with the appraisers who performed the 1979 valuation, U.S. News announced that it expected to make a decision on developing its real estate within the next year. PX 77. Indeed, the appraisers were told that there was a strong likelihood that the Company would participate in some type of venture and that real estate prospects were very promising. *Id.* The 1979 American Appraisal report reflected these discussions, noting that

> management has recently begun studying various alternatives in the development of the company-owned real estate. There is a good possibility that after development, U.S. News will have a significant income producing property(s). While the development of the real estate, and income therefrom, may be several years away, some weight must be given to this potential income source in valuing the common stock shares of U.S. News.

PX 19 at 10.

In preparing the 1979 report, American Appraisal understood that U.S. News might decide to develop its real estate, and it considered the realizable value of the real estate not currently needed in U.S. News' publishing business to be a reasonable "proxy" for estimating the effect that possible future development might have on an inves-

tor's assessment of the value of U.S. News stock. *Id.* at 15-16.

Throughout this litigation, plaintiffs have challenged the uses to which the West End real estate was put. They charge that the U.S. News defendants should have regarded the property as an excess asset—beyond the Company's reasonable needs—and that instead they purposely decided and otherwise failed to utilize the land at its highest and best economic use. All of this, plaintiffs assert, was accomplished to their detriment and financial loss. Defendants have responded that the original real estate purchases were made "to protect [the Company's] right to grow." *See, e.g.*, PX 38, Q & A at 4. Several of plaintiffs' experts offered testimony as to what they regarded as excess real estate, which in their view the Company could have developed without interfering with its publishing business. Their testimony and analysis, however, was incomplete and flawed; they failed to consider fully the problems and uncertainties encountered by U.S. News before 1973 and continuing in lesser degree until the mid-70's, as discussed *supra*, pp. 1502-03. Those problems precluded any type of realistic development plans. Much more important and significant was the fact that their testimony presupposed that the interests of the plaintiffs and other shareholders similarly situated should have been valued on a control basis. *See infra* pp. 1514-30.

One of the plaintiffs' several contentions is that the defendant-directors, as fiduciaries, were derelict in failing to discharge their duties in determining and deciding U.S. News policy and keeping abreast of and knowledgeable about corporate affairs. This, they assert, was particularly true with respect to the annual appraisals performed by American Appraisal. The Court finds that such a claim is not supported by the record. The directors as a whole possessed varied abilities, training, and experience. Accordingly, they appropriately relied upon each other and,

where necessary, on each other's particular expertise. This was true in many areas of the Company's business affairs.

Other than John Sweet, two other members of the board of directors were particularly knowledgeable, important and active participants in the day-to-day operating and long-range development of corporate affairs. Bert Padrutt and his successor, Raymond Naimoli, played central roles during the class period in their position as treasurer and chief financial officer. Their fellow board members recognized the training, experience, intelligence and expertise that they brought to their office. The other directors who testified at trial all asserted that they relied upon Padrutt's, and then Naimoli's, judgment and advice in matters relating to the requirements of the assignments undertaken by American Appraisal, major decisions relating to use of the real estate, corporate finances, and other matters involving business decisions as they related to and impacted on the employee shareholders and Plan beneficiaries.

Padrutt was a certified public accountant with more than 15 years experience when he entered on duty as controller and later treasurer. Before joining U.S. News, he had worked with the Ernst & Ernst accounting firm (now Ernst & Whinney) and had been involved in their annual audits of U.S. News. During his tenure as chief financial officer, he regularly conferred with representatives of American Appraisal when they undertook their assignments, and he made the department heads and other directors available for conferences with the appraisers. He also reviewed and discussed with the appraisers their final reports to ensure that he understood their basic assumptions, that they were appropriate and well documented and that the final report could be supported and defended.

The Court was left with the impression that Mr. Padrutt was a methodical, thorough and knowledgeable executive who knew what was required as chief financial officer under the circumstances. He understood he methodology

employed by the appraisers and believed that their approach was appropriate. When it was required and dictated by the circumstances, he consulted with outside counsel, Don Harris of Covington & Burling, on matters relating to the Profit-Sharing Plan and employees' stock interests.

Naimoli was hired as chief financial officer in mid-1980. Like Mr. Padrutt, he possessed academic credentials and prior professional experience which equipped him for the position. As an accredited public accountant he had a previous and widening work experience with a major accounting firm, the Arthur Young Company. He also served for approximately 10 years as corporate controller for Scholastic Magazine, a reputable publication. Because U.S. News was experiencing unusual changes when he entered on duty and because of his recent introduction to U.S. News and to the appraisal of its closely held stock, he proceeded cautiously but with a recognition of immediacy. As did his predecessor, Naimoli consulted with Don Harris about the facts surrounding the 1962 reorganization, particularly the methodology to be employed in valuing U.S. News' stock.[16]

As a first assignment he reviewed prior efforts of the Company to develop its real estate with the hope of placing such efforts on a firmer track. *See* 30 Tr. 5982-84. In this connection U.S. News retained the law firm of Arnold & Porter in late 1980 to study development possibilities. In turn, Arnold & Porter hired the Julien Studley Company, a marketing consultant group, to assist in planning and to estimate current and projected values from development

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[16] In addition, members of the Board, throughout the class period, relied upon the audits of the Plan's financial statements by the accounting firm of Ernst & Whinney. Two of the auditors testified at trial that Ernst & Whinney's review of the appraisal methodology used to calculate the value of the Class A shares was appropriate and reasonable. *See* 59 Tr. 11,398-99, 11,448-49 (McMahon); 60 Tr. 11,607-10 (Dietrich).

of the real estate. In January 1981, Arnold & Porter submitted an analysis of possible avenues for development, together with an optimistic report from Studley. Two alternatives were advanced for consideration: an immediate all-cash sale or a joint venture. On April 9, 1981, U.S. News distributed a prospectus developed by Arnold & Porter and Studley, soliciting a joint venture partner to develop its real estate. The Carr Company did not consider the proposal particularly attractive and did not submit a bid. Even so, on August 11, 1981, U.S. News signed a letter agreement with Boston Properties, Inc., providing for a series of limited partnerships to develop all of U.S. News' real estate parcels in the West End.

In December of 1983, an unsolicited offer was made to purchase the Company for $1,000 per share. The highest value at which the U.S. News stock had been appraised up to that point was only $470 per share. The employee-shareholders were advised and made aware of these developments. Accordingly, with the consent of a majority of the beneficial owners of its stock, U.S. News solicited bids for sale of the corporation during the following spring. The winning bid was that of Mr. Zuckerman, a principal of Boston Properties. The magazine was subsequently sold in October of 1984 for $176 million, or roughly $2,800 per share.

2. Acquisition of Other Assets

In addition to is real estate holdings, U.S. News acquired in 1975 and 1976 a minority stock interest in Atex, a supplier of photocomposition equipment to the magazine industry. While that stock was carried on the books at cost throughout the class period, when it was exchanged in 1981 at a significant profit for stock in the Eastman Kodak Company, the transaction was in part reflected in the 1981 annual appraisal. In 1978, U.S. News acquired a minority block of stock in Publishers Phototype, Inc., another photocomposition company. In 1981, U.S. News

made other investments and acquisitions, primarily in the phototypesetting field. American Appraisal's treatment of these assets is considered *infra*, pp. 1530-33.

The *Foltz* complaint was filed in February 1984, when previously retired employees learned from newspaper accounts that the December 1983 offer of $1,000 per share had been made. *See* 2 Tr. 216-18, 274-75 (Folz). The *Richardson* suit followed and was filed in July of 1985. It was consolidated with *Foltz* in March of 1986 for pretrial proceedings and trial.[17]

III. ANALYSIS

While sometimes lost sight of, the central issue requiring resolution in this litigation has always been the propriety of the methodology employed in appraising the U.S. News stock. Plaintiffs maintain that the annual stock valuations, performed for U.S. News by American Appraisal, were

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[17] The 1984 sale of U.S. News occasioned a number of other lawsuits. Two of the directors who had been excluded from the class, *see supra* p. 1497, filed independent actions, *John H. Adams v. U.S. News & World Report, Inc.*, C.A. No. 85-4038, and Estate of *Ben Grant v. U.S. News & World Report, Inc.*, C.A. No. 86-0156. *Adams* was dismissed by stipulation of the parties, Order of March 13, 1986, while *Grant* was dismissed upon summary judgment. 639 F.Supp. 342 (D.D.C.1986).

On May 12, 1986, a former employee who had retired in 1983 filed suit and hoped to have his case consolidated for trial with *Foltz* and *Richardson*, *James E. Sacra v. U.S. News & World Report, Inc.*, C.A. No. 86-1297. That very ambitious request was denied by Order of August 17, 1986. *Sacra* is currently awaiting the outcome of *Foltz* and *Richardson*.

Finally, on January 29, 1987, after trial of *Foltz* and *Richardson*, two additional former employees filed suit, represented by the *Richardson* counsel, *Russell W. Fritz v. U.S. News & World Report, Inc.*, C.A. No. 87-0207 and Gaynelle L. *Mallard v. U.S. News & World Report, Inc.*, C.A. No. 87-0208. Mr. Fritz retired in 1982 and Ms. Mallard in 1983. Those cases are again awaiting a ruling on the claims in these consolidated proceedings.

not only grossly inaccurate throughout the class period, but were the result of collusion between those two defendants. Their basic quarrel with the appraisals is that they did not value the Plan's stock holdings, which constituted a majority of the Company's outstanding stock, on a control basis. This alleged failure, in turn, resulted in the minimization or exclusion from the appraisals of the value of the Company's non-operating assets, primarily the real estate.

As analyzed by the Court in its summary judgment opinion entered in *Richardson*, plaintiffs' claims in both actions fall more or less neatly into two categories. *See* 639 F.Supp. at 599. The first comprises claims premised upon intentional or fraudulent conduct and includes claims for breach of the fiduciary duty of loyalty under ERISA § 502(a)(3), securities and common-law fraud, common-law breach of fiduciary duty, and unjust enrichment. The second encompasses claims based upon negligent, imprudent, arbitrary or capricious conduct and includes claims for benefits due under ERISA § 502(a)(1)(B), for breach of the fiduciary duty of care under ERISA § 502(a)(3), and for negligence and negligent misrepresentation. The effect of the Court's summary judgment decision in *Richardson* and of its ruling on defendants' Rule 41(b) motions in *Foltz* was to dismiss all those claims premised upon intentional or fraudulent conduct, on the grounds that there was no evidence in the record that any of the defendants engaged in any course of conduct designed deliberately to undervalue the Company's stock. *See* 639 F.Supp. at 603-10; 54 Tr. 10,326-27, 10,328-33.

What remains are plaintiffs' allegations that U.S. News, the director-defendants, and the Plan acted negligently or unreasonably in accepting American Appraisal's valuations for each of the class years. The second portion of the trial as to liability, commencing with the beginning of defendants' case-in-chief, dealt extensively and exclusively with whether the appraised values were reasonable in light

of the circumstances. In this connection, plaintiffs and defendants presented several expert witnesses each. Their testimony addressed the issue of whether what was done during the class period conformed to acceptable and recognized procedures and standards and was otherwise appropriate and, if not, what should have been done. Defendants also presented an additional expert, Mr. Chester Gougis, who had undertaken an independent, "blind" appraisal of the Company's stock during each of the class years. His testimony was proffered to corroborate American Appraisal's valuations.

After consideration of the expert testimony presented, the Court is not persuaded that the appraisal methodology was improper or flawed, or that the per-share price arrived at each year by American Appraisal did not fall within a reasonable range of acceptable values. Having decided that the appraised values were reasonable, the Court must and does conclude that their acceptance and use by U.S. News was reasonable and thus cannot form the subject of any cause of action. Accordingly, the Court determines that plaintiffs have simply suffered no redressable injury, initial appearances aside. The Court also concludes that, because the Plan stock was reasonably valued on a minority-interest basis, the common or bonus stock was necessarily properly so valued.

The Court now presents its findings of fact and conclusions of law with respect to defendants' motions under Fed.R.Civ.P. 41(b), which dealt solely with the issue of intentional or fraudulent conduct. It then addresses the controversial and central issue dealing with the appropriate appraisal methodology.

A. Defendants' Motions to Dismiss and for Judgment Under Rule 41(b), Fed.R.Civ.P.

The Court's bench ruling on defendants' Rule 41(b) motions served to narrow further the issues remaining to be considered following plaintiffs' case-in-chief. The initial

findings announced from the bench were not detailed. It is thus necessary to flesh out the findings of fact and conclusions of law in greater depth as contemplated under Fed.R.Civ.P. 52(a). In expanding upon its previous oral ruling, the Court again notes that, "[i]n a case tried without a jury, the trial court is not required to consider the evidence in the light most favorable to the plaintiff in determining whether to grant a motion to dismiss under Rule 41 made at the completion of the plaintiff's case." *Woods v. North American Rockwell Corp.*, 480 F.2d 644, 645-46 (10th Cir.1973). "Rather, the court is required to weigh all the evidence, resolve any conflicts and . . . decide itself where the preponderance lies." *Albright v. United States*, 558 F.Supp. 260, 264 (D.D.C.1982), *aff'd*, 732 F.2d 181 (D.C.Cir.1984).

The bench ruling eliminated from *Foltz* all claims premised upon intentional or fraudulent conduct—that is, claims for securities and common-law fraud, common-law breach of fiduciary duty and unjust enrichment, as well as claims for breach of the fiduciary duty of loyalty under ERISA § 502(a)(3). All such claims had previously been considered and eliminated from *Richardson* on summary judgment, so that the bench ruling in *Foltz* placed both cases on equal footing.

As originally pleaded, plaintiffs' claims of intentional or fraudulent conduct on the part of the several defendants appeared at first blush to be superficially plausible. Their seeming vitality and strength sprang from an initial perception that the class plaintiffs had been treated unfairly compared with those U.S. News employees who had benefited from the 1984 multimillion dollar sale of the Company. As the trial unfolded,[18] however, it became

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[18] While in *Richardson* defendants challenged the substance of plaintiffs' claims of fraud or other intentional wrongdoing on summary judgment, resulting in their dismissal, the *Foltz* summary judgment motions for the most part only dealt with certain threshold legal ques-

increasingly apparent that the claims were not supported by reliable and credible evidence. Indeed, with the benefit of a considerable record of discovery and trial testimony, it is clear that the various claims to some degree are mutually contradictory. Plaintiffs charge both that U.S. News conspired with American Appraisal to undervalue the Company's stock and withheld information from the appraisers. In this way, plaintiffs portray the appraisers both as active wrongdoers and as unwitting dupes. While such a contradiction might have been tolerable at the pleading and discovery stage, its continued existence at trial indicates that plaintiffs simply failed to develop a reasonable and plausible theory of their case in this respect. Accordingly, those defendants accused of intentional or fraudulent conduct—that is, U.S. News, the director-defendants, and American Appraisal—moved to dismiss all claims against them premised on such conduct.

1. Claims Against the U.S. News Defendants

Plaintiffs have failed to carry their burden of demonstrating that U.S. News conspired with American Appraisal in any way to manipulate the appraisal process and to undervalue the Company's stock. The same is true of their claim that the U.S. News defendants withheld information from American Appraisal concerning the Company's real estate development plans, or that the Company and its directors withheld information from the employees concerning those plans and concerning the appraisal methodology employed generally. None of these claims finds support in the testimony presented by plaintiffs.

a. Conspiracy with American Appraisal

To demonstrate a conspiracy between U.S. News and American Appraisal, plaintiffs succeeded in pointing to only two instances of alleged wrongdoing, arising from the year-end 1978 and 1980 appraisals, from which they urge the

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tions. Therefore, as of the commencement of trial, many claims of fraud or other intentional wrongdoing remained for resolution in *Foltz*.

Court to draw an inference of fraudulent conduct. Such an inference would be completely unwarranted, as is discussed in connection with the claims against American Appraisal, *infra*.

In addition to the absence of any conspiratorial conduct on the part of the U.S. News directors, defendants have pointed to the absence of any motive on their part for undervaluing the Company's stock. They argue instead that, like any managers, they had every reason to maximize the value of the Company's stock in each year. Plaintiffs insist, however, that the operation of the deferred compensation structure set up for the benefit of the directors supplied a motive for undervaluing the stock.

Subsequent to the 1962 reorganization, U.S. News directors and officers were no longer able to purchase shares in the Company.[19] Instead, a deferred compensation plan was instituted, briefly noted *supra*, whereby directors and other key employees were awarded blocks of "phantom stock," redeemable upon retirement at the appraised price of the Company's Class A and common shares. The phantom stock shares could not be voted and were subject to forfeiture if the awardee left the Company before normal retirement.

While such shares were awarded at periodic intervals until each holder received a maximum of 2,400 shares, in 1982, for various reasons that have been fully explored and dealt with elsewhere, *see* 639 F.Supp. at 604-05, and which with benefit of later trial testimony need not be further discussed, awards to several eligible persons were accelerated by the Board. When the Company was sold in 1984, the phantom stockholders received payment for their shares from Mr. Zuckerman, but at a price considerably less than that paid for the Class A and common stock.

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[19] Neither were they eligible to participate in the stock bonus plan. They were eligible to participate in the Profit-Sharing Plan.

Throughout this litigation, plaintiffs have maintained that there was something wrongful about the phantom stock awards. Unfortunately, they have failed to articulate exactly what it is that the Court should be concerned with. *See* 627 F.Supp. at 1174. Presently, they argue that the awards created in the director-defendants some perverse incentive for undervaluing the Company's stock during the class period. Specifically, they have attempted to show that the directors were concerned that a rapid rise in the amount of benefits to be paid separating employees, triggered by a "full" valuation of the Company's stock, would have forced the Company to be prematurely liquidated before they could "cash in" their phantom stock interests. If anything, however, the natural incentive on the part of the directors would have been to ensure that the Company's stock be fully valued on *whatever* date their phantom stock obligations were to be redeemed. Defendant Keker, for instance, was concerned that, upon his reaching retirement age in 1982, his key employee shares[20] should not be redeemed until sometime later. 4 Tr. 793-800. If it were only a question of manipulating the appraisal process, he would have been interested in "manipulating" the 1981 valuation upward, knowing that he faced his normal retirement date in 1982. Similarly, other directors redeemed stock during the class period and thus would have made unlikely participants in a conspiracy to undervalue the Company's stock during that time. *See Estate of Grant v. U.S. News & World Report, Inc.*, 639 F.Supp. 342, 345-46 (D.D.C.1986) (Ben Grant); 25 Tr. 4996 (Howard Flieger); PX 1 (Robert Osmond, John Adams).[21] Not only does

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[20] Mr. Keker held 2,400 shares of key employee stock, which he acquired before the reorganization. 3 Tr. 428-30. Yet whether he held phantom stock or key employee shares, his incentive not to have those shares undervalued would have been the same.

[21] Indeed, former directors Grant, Adams, Osmond, Flieger and Kirby were originally members of the plaintiff class, but were later excluded. *See supra* pp. 1497-98; *see also Estate of Grant*, 639 F.Supp. at 344.

plaintiffs' theory appear fanciful and illogical, but more importantly it is contradicted by the only credible testimony and documentation in the record.

Accordingly, the Court lays to rest, and with finality, any concern that the deferred compensation rights awarded to individuals at U.S. News were somehow wrongful.

b. Nondisclosure of Information to American Appraisal

It is undisputable that U.S. News gave American Appraisal all relevant information regarding the 1981 joint venture agreements. *Richardson*, 639 F.Supp. at 603-04. While plaintiffs might quarrel with the manner in which American Appraisal treated this information in the 1981 valuation, certainly nothing that was done or not done is in any way reflective of fraud or intentional misconduct. It is true, however, that American Appraisal's treatment of the U.S. News real estate in 1981 was more involved than usual. But if the appraisers gave less attention to the real estate in prior appraisals, it was not because U.S. News had withheld information from them.

In 1981, when the year-end 1980 appraisal was conducted, U.S. News had received the Julien Studley report, analyzing the development potential of the Company's real estate. When chief financial officer Ray Naimoli offered the report to the appraiser, David Marshall, Mr. Marshall indicated that, in the absence of a firm commitment by a developer, such a study would not be relevant to an appraisal of the Company's stock. 31 Tr. 6245, 6247-48 (Naimoli). Nevertheless, Naimoli told Marshall that Studley had arrived at a FAR value of $53.[22]

The only other real estate plans of note were contained in the 1976 proposal of the Oliver T. Carr Company to

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[22] With a FAR of 6, the $53 value works out to $320 per square foot.

construct a new headquarters building. The notes of the appraisers who performed the 1975, 1976 and 1977 appraisals knew of the Carr plans. PX 782 at 10,875; PX 294. Mr. Marshall, who did the appraisals for 1978 through 1981, contacted the Carr Company himself with regard to the 1978 report and was directed to the Carr Company by U.S. News with respect to the 1979 report. PX 67, 77, 85.

Not only did U.S. News not withhold information relevant to its real estate development plans, but by the admission of plaintiff's own real estate expert, Mr. William Harps, such proposals in the absence of a finalized plan for development would not even be relevant to a real estate appraisal, much less to a stock appraisal. *See* 33 Tr. 6599; 34 Tr. 6766-69. For that same reason, Marshall's lack of interest in the 1980 real estate analysis offered him by Naimoli was not unjustified.

c. Nondisclosure of Information to U.S. News Employees

Plaintiffs contend that the U.S. News defendants wrongfully concealed information about the Company and its appraised value that would have been relevant to them. In its summary judgment ruling, the Court recognized that, if plaintiffs could show that they would have altered their retirement plans upon receipt of information that had been withheld, information indicating that the Company was undervalued, they could make out a claim for securities fraud and, by extension, common-law fraud. *See* 627 F.Supp. at 1159-61. On the present record, however, it is clear not only that there was nothing to conceal—the Company's stock had not been undervalued—but that U.S. News did disclose information relevant to the areas of concern here.

First, U.S. News made no attempt to conceal the fact that American Appraisal valued the Company every year on a minority-interest basis. At the annual spring shareholder luncheons beginning in 1974, and at more informal

gatherings, Chairman John Sweet and other members of the Board freely disclosed that the Company could be sold for several times the value that one would obtain if one were to multiply the appraised price per share by the number of outstanding shares. Even if this information, spelled out specifically at the 1978 annual shareholder luncheon, *see* PX 11, Q & A at 11, did not make the matter plain enough, certainly such a revelation would be inconsistent with an attempt to keep the information secret. *See Richardson*, 639 F.Supp. at 603 n. 16.

As a general matter, the annual shareholder luncheons afforded employees an opportunity to obtain a fair amount of information about the financial circumstances of the Company. While Mr. Lawrence met with his employees on a regular basis, he tended to be relatively tight-lipped about Company affairs, fearing the leak of information that might prove helpful to competitors. Mr. Sweet, on the other hand, was more forthcoming in answering employees' queries about their Company. *See* 2 Tr. 333-35 (Foltz). Beginning with those for year-end 1976, Sweet distributed written summaries of the Company's financial statements, in advance of the annual luncheons. PX 144-48. At the meetings Sweet would cover the Company's financial developments during the previous year in some detail. Employees were invited to ask questions at the conclusion of his remarks. There were no limits on the questions that could be asked,[23] and no one was made to feel inhibited. *See* 2 Tr. 251 (Foltz). Transcripts were made available for all those who could not attend the meetings, including those persons assigned to stations outside the Washington area.

With respect to the treatment of the real estate in the annual appraisals, the absence of any attempt to conceal relevant information is even more striking. At the 1974

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[23] Mr. Sweet, as a matter of policy, declined to answer employees' questions concerning the compensation of persons working for the Company.

shareholder luncheon, for instance, Mr. Sweet, recently elected Chairman of the Board, told those present that the Company's real estate was carried on the books at only one-third of its full value. PX 37, Q & A at 12. While in ruling on the *Foltz* motions for summary judgment, the Court declined to find that that revelation removed any material issue of fact as to notice on the part of plaintiffs, 627 F.Supp. at 1151, the situation is somewhat different in the present posture of this case. First, whether or not Chairman Sweet's remarks were sufficient to impute notice to the class is a question that must be answered only upon finding that defendants engaged in a course of conduct designed to conceal some alleged wrongdoing. On the present record, however, it is clear that no such concealment was attempted. Rather, Sweet's remarks at the 1974 luncheon are merely illustrative of management's lack of interest in keeping things secret. Second, at the summary judgment stage, the Court was concerned that plaintiffs' knowledge of how the real estate was treated on the books might shed too little light on their understanding of how it was treated in the appraisals. *See* 627 F.Supp. at 1151. However, after the conclusion of plaintiffs' case-in-chief, it became evident that plaintiffs were under no misapprehension as to whether the Company's potential real estate bonanza was fully reflected in their appraised value of its stock. In fact, several of the class plaintiffs testified freely at trial that, during the class period, they believed that the real estate was undervalued and not adequately accounted for in the annual appraisals. *See* 2 Tr. 406-08 (Foltz); 24 Tr. 4850 (Edward Castens). In view of such sentiments among its employees, the Company's disclosure that its real estate was carried at only one-third of value is certainly inconsistent with any plan of concealment.

Neither did management attempt to conceal the status of the Company's plans for the development of its land. *See, e.g.*, 2 Tr. 354-59 (Mr. Foltz was generally aware of the Company's development plans). Employees were told

when plans toward the construction of a new headquarters building were suspended; they were notified when prospective joint venture partners were solicited in 1981 and, again, when the joint venture agreements were signed with Boston Properties later that year. At the same time that they were told of the joint venture solicitations, plaintiffs were pointedly advised that they might want to consider leaving their account balances in the Plan so that they might share in and secure the benefits of the anticipated increase in the value of the Company's stock. PX 50.

Plaintiffs point to two instances, however, where management was in their view less than forthright in keeping them advised of relevant information. First, they adduce a December 1980 memorandum to Company department heads from Mr. Sweet, PX 319, which enclosed a second memorandum to be circulated to employees, notifying them of potential development plans. In the cover memorandum, Sweet instructs the department managers not to go beyond the contents of the enclosed memorandum in their discussions with employees. When the *Foltz* summary judgment motions were considered, it seemed at least plausible that the cover memorandum suggested a secretive attitude on the part of management, consistent with a pattern of concealment. 627 F.Supp. at 1153. After considering the relevant trial testimony, however, the Court has little doubt that Mr. Sweet's real concern was that employees not be provided with overly optimistic assessments of future developments, which might have led them to act hastily in making their retirement plans. *See* 25 Tr. 4941 (Sweet).

Plaintiffs similarly point to an October 21, 1980 letter from Treasurer Bert Padrutt to outside counsel Don Harris, PX 317, in which Padrutt questions Harris about potential liability to employees who might retire between the announcement of development plans and the next appraisal. Padrutt was concerned that such employees, who would receive benefits based on the value of the Company's stock as of the close of the last calendar year, would

feel deprived in not benefiting from any increase in the value of the Company's stock during the current year. In fact, to avoid precisely this contingency, the directors voted subsequent to the signing of the joint venture agreements in 1981 to award benefits to employees retiring between that date and December 31, 1981 based upon the value of the stock as of the latter date. *See* 42 Tr. 8255-57 (Padrutt).

2. Claims Against American Appraisal

Upon entry of partial summary judgment for defendants in *Foltz*,[24] the claims against American Appraisal for intentional wrongdoing were reduced to claims for securities and common-law fraud arising out of the conduct of the year-end 1978 and 1980 appraisals and for participation with the U.S. News defendants in a breach of fiduciary duty under ERISA § 502(a)(3) with respect to the appraisals for 1977 through 1980. On closer inspection, however, the record reveals no such conduct either on the part of U.S. News and the director-defendants or American Appraisal.

With respect to the 1978 and 1980 appraisals, plaintiffs point to certain apparent irregularities that they claim indicate a deliberate undervaluation of the Company's stock. In ruling upon defendants' motions for summary judgment, the Court believed that further inquiry into these matters was merited and, consequently, declined to grant defendants summary judgment as to claims arising out of these instances of apparent misconduct. *See* 627 F.Supp. at 1152-53, 1156, 1163, 1179-81. With benefit of relevant testimony and a full trial record now before the Court, it is clear that these challenges are lacking in merit.

Pointing to the 1978 appraisals, plaintiffs complain that the final value of $105 per share was arrived at after a senior appraiser, not otherwise involved with the valuation

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[24] On summary judgment in *Richardson*, all claims against American Appraisal were dismissed.

for that year but who had done appraisals in prior years, provided U.S. News with that figure in advance of the completion of the final report. The two appraisers assigned to the valuation for that year had arrived at a somewhat higher preliminary figure of $117-118, but acquiesced in the $105 value. The more senior of the two appraisers testified that he was actually more comfortable with the second approach and that, in any event, any figure within the range of $105 to $118 would have been reasonable. 28 Tr. 5571-87; 29 Tr. 5913-16, 5950-51 (John Russell). It is undisputed that U.S. News knew only of the $105 number and was not privy to any discussions among the appraisers of any other figures. Hence, the final value of $105 could not have been the product of any collusion between U.S. News and American Appraisal and was not the result of a venal desire to keep the value per share as low as possible. Moreover, because the testimony demonstrates, and the Court finds, that the appraised price of $105 per share was within a range of reasonable values, the publication of that value by American Appraisal cannot be seen as the result of any deliberate misconduct, nor its acceptance by U.S. News as unreasonable.

With respect to the 1980 appraisal, plaintiffs charge that the appraiser might have been improperly influenced by a remark, made by Mr. Naimoli during a standard interview, that a certain range of values had been given to the Company's auditors for use in performing some unrelated calculations. *See* 627 F.Supp. at 1153 & n. 12. The uncontroverted testimony is that there was no such influence and that the remark was perfectly innocent. Hence, no possible liability could attach to its utterance.

Plaintiffs' ERISA claims against American Appraisal fare no better. In ruling on that defendant's motion for summary judgment in *Foltz*, the Court held that, with respect to claims falling within the statute of limitations period (*i.e.*, those arising out of the 1977 through 1980 appraisals), American Appraisal might be liable for par-

ticipating in or furthering a fiduciary breach on the part of U.S. News and the director-defendants. *See* 627 F.Supp. at 1156, 1168. Yet, as is now apparent, there was no breach of fiduciary duty on the party of U.S. News or its directors. Such a breach would have occurred, under plaintiffs' theory of the case, if those defendants had sought intentionally to undervalue the Company's stock to the detriment of the employee participants in the Plan. However, the Court finds that there is no evidence in the record to support a finding that defendants engaged in any sort of deliberate misconduct. Moreover, as discussed *infra*, the Court further finds that the Company's stock was not undervalued at all.

In sum, plaintiffs have failed to support their claims by a preponderance of the evidence. After months of testimony, the record clearly shows that neither U.S. News, its directors, nor American Appraisal engaged in any scheme of deliberate misconduct designed to defraud or otherwise injure plaintiffs in any way.

B. The Nature of the Court's Inquiry—Valuation Issues

This litigation is concerned not with fraud, but with the proper apportionment of the proceeds or benefits from the sale of an employee-owned business. As the law stands now, such proceeds will not be distributed to former employees who left the business prior to the sale, unless it can be shown that they would have been entitled to a greater portion of benefits at the time they separated. In other words, the approach to be used is not retrospective, but prospective. One must look at the situation as of the time that each employee separated from the Company. Therefore, the appropriate inquiry is whether the Company was properly valued during the class period, not whether former employees become eligible for a greater share of benefits upon the contingency of a subsequent sale.

Employee benefits plans, like the one at issue here, are governed by two spheres of regulation, the private and the public.[25] Such plans are established by private parties—either by the employer acting alone, or by agreement between the employee and employees—and generally operate according to the terms established by the controlling documents. If, however, one or more of such terms conflicts with any provision of federal regulation, in this case ERISA, then those terms are rendered invalid. Hence, in examining whether plaintiffs are owed additional benefits, one must answer two questions. First, under the terms of the documents governing the Profit-Sharing Plan, are plaintiffs owed greater benefits than they received? Second, if not, are there supervening provisions of federal law that render the relevant Plan provisions invalid and that entitle plaintiffs to greater benefits? Finally, if neither the Plan provisions nor the requirements of ERISA speak directly to the issue here raised—the proper amount of plaintiffs' benefits—then the Court must satisfy itself that what was done falls within a range of conduct permitted by both spheres of governance.

1. Standard and Scope of Review

In the *Foltz* summary judgment decision, it was unnecessary to define exactly the appropriate standard against which the conduct of plan fiduciaries should be judged, since it was found that plaintiffs were not entitled to summary judgment on their ERISA claims under even the least deferential standard. 627 F.Supp. at 1169-70. The Court did note that a determination of pension eligibility or of the appropriate level of benefits to be paid appeared to be governed by the "arbitrary and capricious" standard

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[25] While state courts are granted concurrent jurisdiction to hear actions for benefits due under ERISA § 502(a)(1)(B), *id.* § 502(e)(1), 29 U.S.C. § 1132(e)(1), with limited exceptions ERISA preempts all state laws governing employee benefit plans. *Id.* § 514(a)-(c), 29 U.S.C. § 1144(a)-(c).

of review, *id.* at 1169 & n. 55, even though that standard might be applied with a "stern hand and flinty eye," *id.* at 1170 (quoting *Maggard v. O'Connell,* 671 F.2d 568, 572 (D.C.Cir.1982)).

Plaintiffs continue to urge the Court to adopt a stricter "prudent man" standard, found in section 404(a)(1)(B) of ERISA, 29 U.S.C. § 1104 (a)(1)(B). That section requires a fiduciary to discharge his duties "with the care, skill, prudence, and diligence under the circumstances . . . that a prudent man . . . would use. . . ." While that provision does appear, at least superficially, to demand application of a "prudent man" standard, the relevant case law makes it fairly clear that it has no application to the present situation.

A useful gloss is placed on the requirements of section 404(a) by *Struble v. New Jersey Brewery Employees' Welfare Trust Fund,* 732 F.2d 325 (3d Cir.1984). *Struble* acknowledged that courts have generally adopted an "arbitrary and capricious" standard in assessing the denial of personal claims for benefits. *Id.* at 333. The court then contrasted such a situation with those presented in *Donovan v. Cunningham,* 716 F.2d 1455 (5th Cir.1983), *cert. denied,* 467 U.S. 1251, 104 S.Ct. 3533, 82 L.Ed.2d 839 (1984) and *Donovan v. Bierwirth,* 680 F.2d 263 (2d Cir.), *cert. denied,* 459 U.S. 1069, 103 S.Ct. 488, 74 L.Ed.2d 631 (1982). In both *Cunningham* and *Bierwirth,* the fiduciary charged with improper conduct could be said to have either subordinated the interests of the plan beneficiaries to those of a third party, or to have wasted plan assets. The *Struble* court concluded that in such situations the appropriate standard of review was that contained in section 404(a) and not the "arbitrary and capricious" standard. 732 F.2d at 333-34; *see also Fink v. National Savings and Trust Company,* 772 F.2d 951, 955-56 (D.C.Cir.1985). The "arbitrary and capricious" standard does apply, however, where the issue is whether the plan fiduciaries have properly balanced the interests of different

classes of beneficiaries. Fiduciaries thus have broad discretion to resolve the often competing concerns of present and future claimants in order to preserve the financial stability of funds while allocating assets to the advantage of all beneficiaries. *Id.*

A number of courts have followed *Struble* in its analysis of the proper scope of review, or have otherwise found that the "arbitrary and capricious" standard is appropriate in assessing a fiduciary's interpretation or implementation of plan terms, when no outside interests press on the balance. *See, e.g., Holland v. Burlington Industries, Inc.*, 772 F.2d 1140, 1148-49 (4th Cir.1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 3271, 91 L.Ed.2d 562 (1986); *Edwards v. Wilkes-Barre Pub. Co. Pension Trust*, 757 F.2d 52, 55-57 (3d Cir.1985), *cert. denied*, 474 U.S. 843, 106 S.Ct. 130, 88 L.Ed.2d 107 (1986); *Ganze v. Dart Industries, Inc.*, 741 F.2d 790, 792-93 (5th Cir.1984).

Without discussing the dichotomy posited in *Struble*, our Circuit Court has nevertheless recently held that, where trustees face a choice between reasonable alternatives in interpreting or implementing the terms of a plan "[c]ourts will substitute their judgment for that of trustees only if the trustees' actions are not grounded on any reasonable basis. Choices between reasonable alternatives, it follows, are for the trustees, not the courts." *Stewart v. National Shopmen Pension Fund*, 795 F.2d 1079, 1083 (D.C. Cir.1986). In *Stewart* a change in pension calculation, *inter alia*, reduced monthly pension benefits to a 74-year-old retiree from $80 to $9. Even so, the trustees' action was reviewed under the arbitrary and capricious standard.

In determining whether a fiduciary's interpretation of the terms of a plan document is arbitrary or capricious, four factors should be considered: (1) whether the interpretation is contrary to the language of the plan; (2) whether it is consistent with the purposes of the plan; (3) whether it is consistent with the purposes of the particular

provision itself; and (4) whether it is consistent with prior interpretations and whether beneficiaries were on notice of the interpretation. *Donovan v. Carlough*, 576 F.Supp. 245, 249 (D.D.C.1983), *aff'd mem.*, 753 F.2d 166 (D.C.Cir.1985). With these factors in mind, the Court now turns to a consideration of the controlling documents under which the Plan was operated: the U.S. News Profit-Sharing Plan Document, PX 6, ("Plan Document") and the Articles of Incorporation, PX 2.

2. The Controlling Documents

The U.S. News Profit-Sharing Plan was established as "a defined contribution plan," into which the Company paid contributions on behalf of its employees, based upon their compensation, up to a maximum limit. While each member of the Plan had his own account, Plan Document ¶ 6.2,[26] the accounts together constituted "a [single] fund [to] be invested and administered as a unit." *Id.* ¶ 6.3. Those investments included a modest portfolio of marketable securities and, most importantly, the 50,000 shares of U.S. News Class A stock. The net value of a member's account was stated to be his "undivided share of the cash, securities and other property in the Fund," including the Class A stock. *Id.* ¶ 6.4. No member was deemed to have title to any specific assets of the Plan. *Id.* ¶ 6.11.

The Plan Document in paragraph 6.3 further provided that the value of the Class A stock was to be determined each year in accordance with Article Fifth (e) of the Articles of Incorporation. Article Fifth established the mechanism by which the beneficial ownership of the Company was to vest in its employees, "directly or through the corporation's profit-sharing trust." Its provisions thus governed both the Class A and common stock. Under Article Fifth (b), a holder of stock could not sell, transfer or

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[26] While the original Plan Document was amended from time to time, none of the changes made are material to this litigation.

otherwise encumber his shares; if he attempted to do so, the Company at its option could call the shares under Article Fifth (c). That latter provision also gave the Company an option to call the stock in the event that an employee retired, died, or otherwise ceased employment with U.S. News. The value of the stock—both Class A and common—for purposes of Article Fifth was to be its "fair market value" "agreed upon by the parties," or as determined by an appraiser to be selected annually by the Board of Directors. *Id.* ¶ (e).[27] The appraiser was to render his annual valuations "without regard to the restrictions on transfer of stock contained in [the] Article[,]" using the "methods and standards recognized by the regulations of the United States Internal Revenue Service as appropriate for determining fair market value of corporate stock." *Id.* Article Fifth (g) further provided that the option price was payable in cash or in notes of up to 15 years' maturity, bearing 5 percent simple interest, and subordinated to other debts of the corporation.

As is readily apparent, the two controlling documents are not particularly illuminating on the question of whether the Company's stock—either Class A or common—was to be valued on a majority- or minority-interest basis. All that one learns upon reading the relevant provisions of the documents is that it was assumed that the Class A and common stock would be valued equally. If that fact had any significance in 1962, at the time the Company was reorganized, it was that the drafters of the documents contemplated that both classes of stock would be valued on a *minority-interest* basis. This appears to be so in view of the fact that, as of 1962, no shareholder, including the

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[27] Throughout the history of the Company, it was the practice always to retain an appraiser, rather than to seek an agreement on the proper price. Article Fifth(e) did, however, afford employees the right, under certain conditions, to seek reappraisal of the stock. That provision was reprinted on the reverse side of the voting trust certificates issued to employee-shareholders in lieu of stock.

Plan, held more than a minority interest in the Company. Hence, had the Plan sold its holdings back to the Company at any time before 1971, when it became the majority shareholder, it would have been appropriate for it to have done so for a minority price.[28]

Finally, the fact that the fiduciaries charged with administering the Plan interpreted paragraph 6.3 of the Plan Document and Article Fifth (e) to require that the Class A stock be accorded the same minority value as the common stock was certainly not unknown to the Company's employees. Account statements and other documents given periodically to the employees made it reasonably clear that the annual appraisals ordered each year yielded a single per-share value, which was then used with respect to both the bonus and Class A stock. Indeed, no plaintiff testified that he was led to believe that there were in fact two such values. In short, the fiduciaries' interpretation of the relevant documents was not only consistent with the language of the Plan and its purposes,[29] but was consistently used and was understood by the Plan beneficiaries. *Carlough,* 576 F.Supp. at 249.

Recognizing that the Plan Document and Articles of Incorporation were drawn up long before the enactment of ERISA, and noting too that, by the beginning of the Class period the Plan attained a majority position in the Company, it is necessary then to examine whether the continued valuation of the Plan's stock on a minority-interest basis violated ERISA as a matter of law.

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[28] Noteworthy, too, is the fact that the Plan Document nowhere states that Plan members were to share ratably in the value of the *Company's assets* as a whole.

[29] The extent to which the valuation of the Plan stock on a minority basis, by reference to Article Fifth, was consistent with the purposes of the Plan will be discussed further, *infra* pp. 1524-30.

3. Requirements of ERISA

ERISA, enacted in 1974, became effective as of January 1, 1975. The statute was designed to establish uniform, comprehensive and consistently applied protections for the beneficiaries of employee benefit plans. *See* ERISA § 2, 29 U.S.C. § 1001 (Congressional findings); 120 Cong.Rec. 29933-35 (1974) (remarks of Sen. Javits); *id.* at 29928, 29933 (remarks of Sen. Williams) (preemption of state law), *reprinted in* 1974 U.S. Code Cong. & Ad. News 4639, 5177, 5188-89. Congress' primary concern was with the financial soundness of the plans covered, the conduct of those administering them, and the fair treatment of their beneficiaries. Accordingly, the statute as enacted requires plan administrators to report on fund resources and activities to the Secretary of Labor and to employee beneficiaries, 29 U.S.C. §§ 1021-31; regulates participation and vesting requirements, *id.* §§ 1051-61, as well as plan funding, *id.* §§ 1081-86; outlines the responsibilities and establishes a standard of care for plan fiduciaries, *id.* §§ 1101-1114; and provides for the administrative, civil and criminal enforcement of its provisions, *id.* §§ 1131-1145.[30]

Despite the comprehensiveness of the provisions cited above, nothing in ERISA speaks to the amount or method of calculating benefits due plan beneficiaries. Rather, those determinations are left in the hands of the "private parties creating the plan." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511, 101 S.Ct. 1895, 1900, 68 L.Ed.2d 402 (1981). Nevertheless, plaintiffs claim to have found in the body of the statute a firm directive that, in a case such as presented here, where a plan holds a majority block of employer stock, that stock must be valued on a control basis. For reasons that shall become apparent—and for ease of reference—that argument shall be called plaintiffs' "current value" theory.

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[30] Subsequent sections of the statute govern multiemployer plans and plan terminations.

It is noted at the outset that plaintiffs' "current value" theory is entirely a construction of counsel. It draws no support from any judicial or administrative interpretations of the provisions in question. The legislative history is sparse, and what little is found tends to undermine rather than to bolster plaintiffs' position. Indeed, as a simple matter of statutory construction, the theory is not in harmony with the legislative scheme as a whole, relying as it does upon the grafting together of various provisions and terms taken out of context. It is worth noting, too, that none of plaintiffs' several experts saw fit to refer to or rely upon the theory.

Plaintiffs begin by noting that ERISA § 103(a)(1)(A), 29 U.S.C. § 1023(a)(1)(A), requires every covered plan to file an annual report with the Secretary of Labor and to furnish that report to plan participants. Subsection (B) provides that the report shall include a financial statement detailing, among other things, what assets the plan holds. Subsections 103(b)(3)(A) and (C) require that the plan assets be listed at "current value." "Current value" is defined as "fair market value where available and otherwise the fair value as determined in good faith by a trustee or a named fiduciary . . . pursuant to the terms of the plan . . ., assuming an orderly liquidation at the time of such determination." *Id.* § 3(26), 29 U.S.C. § 1002(26). Believing that the phrase "orderly liquidation" somehow speaks to the issue of control valuation, plaintiffs seize upon a supposed difference in meaning between "fair market value" and "fair value," the latter implicating an "orderly liquidation."

Apparently, in plaintiffs' view, the "fair market value" of the Plan's stock would not involve the concept of "orderly liquidation," so that if it were acceptable under ERISA to value plan assets at fair market value, as the terms of the U.S. News plan required, then the notion of an "orderly liquidation" would never enter into the calculus. Of course, plaintiffs cannot argue that ERISA proscribes

valuations at "fair market value"; instead, they maintain that "fair market value" was not "available" within the meaning of the statute because the Company's stock was not publicly traded and that, hence, "fair value" must be used. As just noted, however, the documents under which the Plan was operated did prescribe a means of determining "fair market value"—either the parties would agree upon such a value or it would be arrived at by appraisal. The latter method, which was consistently used, is certainly endorsed by the Internal Revenue Service ("IRS") as appropriate for valuing and allocating trust earnings to a participant's account. *See* Rev.Rul. 80-155, 1980—1 C.B. 84, 85; Rev.Rul. 59-60, 1959-1 C.B. 237 ("fair market value" of closely held stock to be determined by appraisal); *see also Sommers Drug Stores Co. Employee Profit-Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456 (5th Cir.1986) ("fair market value" determined by appraisal for ERISA purposes), *reh. en banc denied*, 797 F.2d 977 (5th Cir.1986).

Other ERISA provisions cast further doubt upon the proposition that there is some qualitative difference between "fair market value" and "fair value." When a plan purchases or sells certain plan assets, it must do so for no more and no less than "adequate consideration." *Id.* § 408(e)(1), 29 U.S.C. § 1108(e)(1). "Adequate consideration" for this purpose means, where there is no "generally recognized market," the "fair market value of the asset *as determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan. . . .*" *Id.* § 3(18)(B), 29 U.S.C. § 1002(18)(B) (emphasis added). Clearly, the statute contemplates that "fair market value" may in some instances be determined by appraisal, as was done in the instant case. The most that can be said for the distinction that plaintiffs attempt to draw between "fair market value" and "fair value" is that, if "fair value" means anything other than "fair market value," it is "fair market value by appraisal." And since a determination of "fair

market value by appraisal" is precisely what was called for under the documents controlling the Plan, the concept of "current value" adds absolutely nothing to an analysis of how the Plan assets should have been valued.

Even if "fair market value" were not available or appropriate and if "fair value . . . assuming an orderly liquidation" had to be determined, plaintiffs would gain nothing by it. The term "orderly liquidation" could mean either an "orderly *liquidation*" of a plan's assets—that is, the immediate sale of all of its assets in some "orderly" fashion—or it could mean an "*orderly* liquidation" of a plan's assets—that is, the sale of a plan's assets in whatever way is most appropriate, whether all at once or over a period of time. Hence, in no way can it be said that the phrase "orderly liquidation" requires that the Plan's stock have been valued on a control basis. If anything, it should counsel otherwise, for the "fair value" language upon which plaintiffs rely itself states that the value of a plan's assets should be arrived at considering the terms of the plan. All other relevant provisions of ERISA also make reference to and, in a sense, incorporate the provisions under which a plan is operated.[31] And since the terms of the U.S. News plan did not contemplate anything other than a series of minority-interest transactions, *see infra* pp. 1521-22, 1524-30, the valuation of its stock on

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[31] ERISA leaves it to the plan to "specify the basis on which payments are to be made to and from the plan." *Id.* § 402(b)(4), 29 U.S.C. § 1102(b)(4). If the terms of payment specified in the plan are not complied with, a beneficiary may bring an action "to recover benefits due to him under the terms of his plan." *Id.* § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). Similarly, a plan fiduciary is required to discharge his duties "in accordance with the documents and instruments governing the plan," to the extent consistent with ERISA. *Id.* § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D). If he does not, a beneficiary may bring an action "to enforce . . . the terms of [his] plan." *Id.* § 502(a)(3)(B)(ii), 29 U.S.C. § 1132(a)(3)(B)(ii).

a minority basis does not offend ERISA even under plaintiffs' "current value" theory.[32]

Finally, it should be noted that plaintiffs' "current value" theory is not consistent with ERISA's statutory scheme taken as a whole. First, it is not the purpose of ERISA to require that plan fiduciaries maximize the benefits paid to departing employees. *See, e.g., Edwards v. Wilkes-Barre Pub. Co. Pension Trust,* 757 F.2d at 56-57. If this were not the case, one would not expect to find, as one does, a requirement that an Employee Stock Ownership Plan ("ESOP")[33] that holds a controlling block of employer stock nevertheless value that holding on a minority-interest basis, if the employer's stock is actively traded. *See* Dep't of Labor P/Opinion 76-52 (1976) (applying ERISA § 3(18)(A)(ii), 29 U.S.C. § 1002(18)(A)(ii)). Nor would one expect to find an endorsement of a plan under whose terms "book value" was to be utilized in determining benefits. *See* Dep't of Labor P/Opinion 77-35 (1977). Second, the purpose that section 103 was meant to serve quite clearly has nothing to do with the calculation of benefits. Section 103 appears in the portion of the statute dealing exclusively with reporting and disclosure requirements. Those provisions, in turn, were designed to provide a means of

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[32] It should be noted that section 103, which contains the requirement that assets be listed at "current value," applies as well to defined benefit plans. Yet the terms of a defined benefit plan, as the name suggests, provide that a specific amount of benefits be paid out, not an amount dependent upon a formula that, in turn, must—under plaintiffs' theory—incorporate the notion of "current value." *See* ERISA §§ 3(34), (35), 29 U.S.C. §§ 1002(34), (35). Hence, it is far more probable than not that the term "current value," has nothing whatever to do with the calculation of plan benefits.

[33] An ESOP is a specific type of employee benefit plan recognized under the Internal Revenue Code ("IRC"). While the U.S. News plan shares many features in common with an ESOP, it does not meet the statutory definition that would qualify it under the Code. *See* ERISA § 407(d)(6), 29 U.S.C. § 1107(d)(6); IRC §§ 401, 409, 26 U.S.C. §§ 401, 409.

overseeing plan administration. *See* 120 Cong. Rec. 29931-32 (1974) (remarks of Sen. Williams), *reprinted in* 1974 U.S.Code Cong. & Ad.News at 5185. The concern was with plans that, through mismanagement or outright criminal activity, become unable to pay the benefits to which their participants are entitled. *See* 120 Cong.Rec. 29934-35 (1974) (remarks of Sen. Javits); *see also Fink v. National Savings and Trust Co.*, 772 F.2d at 956-57. To this end, it is necessary that a plan not overstate the value of its assets when it files its annual reports. It is certainly consistent with that purpose that a plan which pays out benefits based upon a minority valuation of its holdings of employer stock should report the value of those holdings on that same basis. To report a greater value for them in its annual report would seem more repugnant to the statute. This would have been especially true for the U.S. News plan towards the end of the class period, when a large increase in the value of the Company's stock caused the Plan to experience some cash-flow difficulties.

To sum up, plaintiffs' "current value" theory not only lacks support in the text of the statute or in judicial or administrative glosses thereon, but it also is manifestly at odds with the entire scheme that Congress had in mind. The theory must be, and is, rejected outright.

4. Reasonableness of the Appraisal Methodology

Neither ERISA nor the documents under which the Plan operated provide any affirmative directive as to how the Class A stock should have been valued. It therefore becomes necessary to determine whether, within the relatively loose constraints imposed by the statute and the operative documents, the assumptions relied upon and the procedures utilized by the appraisers were reasonable under the circumstances. Plaintiffs of course bear the burden of proof on the valuation.

Plaintiffs of course bear the burden of proof on the valuation issue; nevertheless, it is useful first to canvass

the situation briefly from defendants' perspective. Such an overview demonstrates the *prima facie* reasonableness of defendants' approach.

(a) Defendants' Perspective on Methodology

Defendants' valuation methodology produced a result that was consistent with the provisions of the operative documents. The appraisals arrived at a single, minority value that was reasonable as applied to the minority transactions featured by both the profit-sharing and stock bonus plans. The redemption of the bonus stock each year clearly involved the exchange of small amounts of stock, whose owners had no direct effect on or say in the day-to-day operations of the Company, either in theory or in practice. Participation in the Plan afforded its beneficiaries an even more remote interest in the affairs of the corporation, to the extent that the Plan served as a holding device for shares of stock that the employees themselves did not directly own. As will be seen, there is no reason to look beyond the practical realities of how the Plan functioned and to assume that it could exercise theoretical powers that would have served to enhance the value of plaintiffs' minority interests. *See infra* pp. 1524-30.

Even if a cogent argument could be made to support a control valuation of the Class A stock, it is impossible to say that what defendants did was unreasonable. Clearly, in the absence of any statutory, administrative, or judicial authority for the proposition that a control value might have been indicated, defendants cannot be faulted for employing a minority valuation. As noted, ERISA does not require plan fiduciaries to maximize the benefits of departing employees, *Edwards v. Wilkes-Barre Pub. Co. Pension Trust,* 757 F.2d at 56-57; it only requires them to make a reasonable choice from among possible alternatives. *Stewart v. National Shopmen Pension Fund,* 795 F.2d at 1083. Again, as stated at the outset, no principle

of law governing this litigation demands that monies received from the 1984 sale be distributed to former employees without regard to fault on defendants' part in valuing the Company's stock during the class period. And defendants cannot be faulted for choosing one from at most two reasonable alternatives.

b. Plaintiffs' Perspective on Methodology

In addition to "current value," plaintiffs advance three theories as to why the Class A stock should have been valued on a control basis. They first argue that, because the Class A stock—as well as the common stock—was placed in the voting trust, they acquired the equivalent of a controlling interest by operation of law. They then argue that, because—as they allege—the Plan originally paid a control price for its stock, principles of consistency require that Plan beneficiaries be awarded benefits on a control basis as well. Finally, they maintain that the very fact that the Plan held a majority of the outstanding stock by itself dictates that a majority-interest approach should have been used. The three theories will be discussed in that order.

i. The "voting trust" theory

Plaintiffs believe that, although they were not entitled to vote their shares of stock, those shares should have been valued on a control basis. The fact that such "control" resided in individuals over whom they in turn had no control, they say, afforded them the benefits of control by operation of law. Moreover, that theory, if accepted, would require that plaintiffs' minority holdings of common stock, as well as the Plan's Class A stock, be valued on a majority-interest basis.

As defendants have been quick to point out, the theory has no basis in theory or in practice. First, the voting trust did not, and was not meant to, afford U.S. News employees a controlling voice in the Company. Indeed, the

voting trust instrument states on its face that it was designed only to provide employees with "beneficial ownership" of shares of U.S. News stock—that is, with something less than the full incidents of stock ownership. Moreover, plaintiffs were under no misapprehension as to what Mr. Lawrence intended and had accomplished. As he made clear both when the Company was reorganized in 1962 and subsequently, he still held the reins of control. Plaintiff Charles Foltz recognized this when he testified that Lawrence "took part in virtually everything from top to bottom." 1 Tr. 161. As Chairman of the Board, Chief Executive Officer, and "owner,"[34] Lawrence "had the final say on virtually everything that took place in the publication." *Id.* It is undisputed that he alone voted the stock, just as he had done prior to the reorganization.

After Lawrence's death, when the voting trust agreement came up for renewal, his successor, John Sweet, sent a memorandum to the employees, recommending that they vote to renew the trust. Sweet made it clear in his memorandum that the purpose of the trust was to "concentrat[e] responsibility, authority, and accountability." DX 141 at 4, 7. This was what Lawrence had in mind when he effected the reorganization of the Company, and it is certainly the way that business was conducted during the class period.

Despite the realities of how the voting trust actually worked and of how corporate control was concentrated, first in Lawrence and then in his successor trustees, plaintiffs continue to argue that, because the trustees owed them fiduciary duties to run the Company in their best

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[34] It is unclear whether Mr. Foltz was describing Lawrence's pre-reorganization role or using a shorthand to describe his post-reorganization activities. At neither time was Lawrence actually the "owner" of the Company, although at both he was the sole voting trustee and firmly in command. As Don Harris, U.S. News general counsel during the time, testified, Lawrence was a "very strong executive." 57 Tr. 11034-35.

interests, the voting trust provided a mechanism whereby employees enjoyed effective control of U.S. News. Such an argument, however, simply proves too much. It is always the case that the directors and officers of a corporation manage the company for the benefit of its shareholders and that they owe those shareholders fiduciary duties to manage the company in an acceptable manner. *See* 8 Del.Code Ann.: Gen.Corp.Law § 141(a) (Michie 1983); *Smith v. Van Gorkom,* 488 A.2d 858, 872 (Del.1985); Pogostin v. Rice, 480 A.2d 619, 624 (Del.1984); *Gottlieb v. McKee,* 34 Del.Ch. 537, 107 A.2d 240, 243 (1954); *Harden v. Eastern States Pub. Serv. Co.,* 14 Del.Ch. 156, 122 A. 705, 706 (1923); *see also Matter of Reading Co.,* 711 F.2d 509, 517 (3d Cir.1983).[35] A voting trust adds nothing to a shareholder's rights in this regard, but rather takes away from him the right to vote his stock on certain issues. As to certain other issues, such as mergers and other major corporate changes, the vote of a majority of the beneficial owners of the Company's stock was required. In that situation, then, the voting trust was inoperative. In short, as to day-to-day matters of corporate management, the voting trust added nothing to a shareholder's rights. As to major corporate undertakings, it only gave him back rights that he would normally have retained in the absence of the trust. In no way did the voting trust serve to enhance the power enjoyed by a minority shareholder of the Company.

Under the tax authorities made relevant by Article Fifth, it is well recognized that, not only does the existence of a voting trust fail to make the underlying stock more valuable, it most often decreases the value of those shares. Decisions from the Tax Court amply support the notion that stock stripped of its voting rights is worth less than

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[35] Delaware law governs questions concerning the corporate governance of U.S. News, under applicable conflicts of law principles. *See Restatement (Second) Conflict of Laws* §§ 302(b), 304, 306, 309 (1971).

stock that can be voted. *See, e.g., Estate of Zaiger v. Commissioner*, 64 T.C. 927, 945-46 (1975), *acq.*, 1976-1 C.B. 1; *Estate of Reynolds v. Commissioner*, 55 T.C. 172, 190-94 (1970). For that reason, defendants would have been justified in reducing the value of the Company's stock to reflect the impediment that the trust placed against the full employment of the rights that would ordinarily have attached to the stock. In conclusion, it is noted that plaintiffs have produced absolutely no relevant authority for the contrary proposition that they asked to have the Court endorse.

It almost goes without saying, then, that there is no basis for plaintiffs' assertion that their common stock should have been valued on a majority-interest basis. They have put forward no theory to support such a valuation, under applicable IRS standards,[36] that does not depend upon a finding that the Class A stock should have also been valued on a control basis. Indeed, during closing arguments, the common stock was all but lost sight of. *See* 74 Tr. 14,124-25.

ii. The "consistency" theory

Plaintiffs' "consistency" theory derives its inspiration from the testimony of Mr. Paul Much, one of defendants' experts. Much testified that, where a plan pays for its holdings of employer stock on a control basis, it should also pay out benefits on a control basis, even if it no longer

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[36] The *Richardson* plaintiffs' expert, Mr. Martin J. Whitman, testified that he viewed an appropriate appraisal of the Company's stock as borrowing from statutory appraisal practices developed under state corporation law, practices which represent a departure from the way in which minority shares are viewed under the tax authorities. *See* 43 Tr. 8537; 44 Tr. 8735-45. Yet the valuation clause of Article Fifth points to IRS regulations and standards, not to something else. To the extent that that clause is valid—and it is—there is no reason to accept Mr. Whitman's substitution of his methodology for that followed by American Appraisal.

holds a controlling interest in the employer company. *See* 54 Tr. 10,418-23, 10,472-75; 55 Tr. 10,718-20. He bases his position on the notion that, where a plan pays a premium for stock purchased on behalf of a group of employees, those employees should get the benefit of that premium value. After reading Much's pretrial report, Mr. John Hempstead, plaintiff's expert, came to the conclusion that this theory could be useful for plaintiffs if they could show that the Plan made its purchases of U.S. News stock in 1962 and 1966 at a control price, based upon the May 1962 and December 1965 appraisals.

A brief discussion of those appraisals best demonstrates the risk one faces in relying on the theory.

The May 1962 appraisal

In its language, if not in its methodology, the May 1962 appraisal, DX 357, is unfortunately a study in ambiguity, as Mr. Much testified at trial. *See generally* 54 Tr. 10,433-69; 55 Tr. 10,700-18, 10,780-58. The report begins by announcing that the value determined was of "the entire business enterprise of [U.S. News Publishing] *as a going concern*. . . ." DX 357 at 3 (emphasis added). Plaintiffs, of course, focus on the language "entire business enterprise" and leap to the conclusion that a control value is being provided. On the other hand, the greater portion of the experts who testified at trial associated "going concern" value with minority value—that is, the value of a business as it continues in existence, not as it is liquidated. In light of the report as a whole, the most sense that can be made out of the quoted phrase is that American Appraisal valued the entire business on a minority basis. Such a value would represent the aggregate of all minority interests in the company, in the same way that one might multiply the current "bid and asked" price of a publicly traded corporation by the number of outstanding shares.

Other ambiguities in the language of the report crop up, but all can be similarly resolved. For instance, after

going through a "market comparable" analysis—whereby an appraised price is determined by reference to the prices at which comparable, publicly-owned companies are traded—the report appears to draw a curious distinction. It states that while current publicly traded prices are "pertinent," "day to day fluctuations in the security markets are not such as to be controlling in the valuation of an entire business, as such fluctuations are only for minority stock holdings in the comparatives used." DX 357 at 18-19. The lesson to be borne in mind, apparently, is that the "rather drastic reduction in quoted prices" of the comparable companies was to be given less weight in arriving at the value of the "entire equity" of U.S. News, whose recent trends in growth had been positive. *Id.* at 20. As Mr. Much conceded, this language is indeed ambiguous or seemingly contradictory. Still, a fair reading seems to be that, in valuing the entire business of a company—albeit, on a minority basis—one is more concerned with arriving at a stable value than if one were valuing only an individual minority parcel that might be bought or sold on a day-to-day basis.

The most compelling reason for ignoring the ambiguities in the language of the report is that the purpose of the appraisal was quite clear. The determination of a single value was needed in order to provide a fair price for each of four related transactions: (1) the exchange of shares between U.S. News Publishing and U.S. News; (2) the purchase (from members of the Lawrence family) of U.S. News Publishing shares by U.S. News; (3) the purchase of U.S. News Class A stock by the Plan; and (4) the sale by the Lawrence family of their shares of U.S. News Publishing to U.S. News. DX 357 at 3; *see also* PX 1107 at 10 (request for IRS advance determination letter). As Mr. Much testified, all of these were minority transactions, including the Plan's purchase of its 30,00 shares of Class A stock. Indeed, as U.S. News' general counsel Don Harris stated, the purpose of the valuation was to arrive at a

single, minority price that would serve equally well for each of the four purposes outlined. 57 Tr. 11,096-98. Moreover, because the Plan did not actually acquire control, Mr. Harris believed it would have been inappropriate under IRS standards for the Plan to have paid a control premium for a minority block.[37] *See* 57 Tr. 11,061, 11,065-66. If, indeed, such a price had been paid, it would have been an unwanted surprise, for the Plan might have lost its tax-qualified status.

One final ambiguity is the reference in the May 1962 report to the 1961 sale of a controlling interest in Newsweek, Inc. to The Washington Post Company for $50 per share. Ordinarily such reference would be meaningful only in the context of a control valuation. Its inclusion appears to have been motivated by Mr. Lawrence's conviction that his magazine was worth at least as much as Newsweek and his insistence that some reference be made in the report to the Newsweek sale. *See* 59 Tr. 11,338-41 (Harris); 3 Tr. 432 (director-defendant Samuel Keker). In fact, as the analysis of the Newsweek sale reveals, U.S. News was apparently worth more—on a control basis—than the $50 per share or $15 million indicated for Newsweek and as a final conclusion of value for U.S. News.[38] Finally, American Appraisal did not undertake the kind of analysis of asset values that one normally expects to accompany a control valuation, nor did it seek to apply a control premium to the value that it obtained from the market comparable approach. In short, the reference to the Newsweek sale at most appears designed to support a minimum mi-

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[37] Today, under ERISA, it would be similarly improper for a Plan to pay more than "adequate consideration" for a block of employer stock. *Id.* § 408(e)(1), 29 U.S.C. § 1108(e)(1); *Donovan v. Cunningham*, 716 F.2d 1455 (5th Cir.1983), *cert. denied*, 467 U.S. 1251, 104 S.Ct. 3533, 82 L.Ed.2d 839 (1984).

[38] Mr. Much testified that, if American Appraisal had used the Newsweek data to arrive at a *control* value for U.S. News, such a value would have been more on the order of $24 million.

nority value of $15 million, which was the value finally determined for U.S. News.[39]

The December 1965 appraisal

There can be little doubt that the December 1965 appraisal, DX 363, was performed on a minority-interest basis. The appraisal methodology was the same as that used during the class period, in that it arrived at a per-share value by reference to the prices at which the stock of comparable publicly-owned companies traded. Unlike some of the later appraisals, however, it gave no consideration to the value of the Company's underlying assets, rendering it an even "purer" minority appraisal.

Concentrating on the language of the reports, again, plaintiffs point out something that they think is in their favor. The appraisal reports through that of December 1964 state that the valuations arrived at therein gave "no consideration . . . to the relative value of minority holdings, which usually have a lesser Fair Market Value than the business as a whole." This means, plaintiffs say, that the valuations were all done on a control basis. Interestingly enough, however, the December 1965 report states only that "consideration . . . *may* be given to the relative value of minority holdings. . . ." DX 363 at 2 (emphasis added). If the change is significant, it certainly does not cut in plaintiffs' favor.

Yet the change in the language, indeed the language itself, is of little, if any, significance. Every report rendered by American Appraisal was indeed a minority report, as is clear from the methodology employed. While some reports do state that "no consideration" is to be

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[39] As noted, the $15 million works out to a per share value of $50. That value, in turn, was the same as the December 1962 value and less than the values in each subsequent year. And since the latter valuations were quite clearly done on a minority basis, it follows that the May 1962 price of $50 per share was a minority price.

given to the lesser values of minority shares, that disclaimer apparently meant only that no further discount from the minority price arrived at through the market comparable analysis was to be taken to account for the fact that smaller blocks of stock tend to be less attractive to investors. Mr. Harris testified that this is what was in his contemplation from the time of the earliest appraisal. He stated that what was sought was a "basic" valuation—done on a minority basis—with no further adjustment based upon the size of the individual blocks being valued. In his mind, "minority discount" meant a discount applied to a minority block of stock to reflect not its lack of control, but its relative lack of marketability. He understood that the prices arrived at through a market comparable analysis were themselves minority prices. *See* 57 Tr. 11,123-24; 59 Tr. 11,355. In other words, by "minority discount" he simply meant "marketability discount," a discount which was not applied to the U.S. News stock until 1975.[40] Although it is unfortunate that he mixes the terminology somewhat, his understanding of the process is perfectly accurate. *Cf.* Fellows & Painter, *Valuing Close Corporations for Federal Wealth Transfer Taxes: A Statutory Solution to the Disappearing Wealth Syndrome*, 30 Stan.L.Rev. 895, 921 n. 89 (1978) (some confusion exists over the difference between minority and marketability discounts).

Harris went on to testify that the language was changed, effective with the 1965 report, in order to avoid any appearance that American Appraisal failed to take into account any relevant factor. 58 Tr. 11,243. The American Appraisal representative who did the December 1964 appraisal (and did it on a minority basis), Mr. John E. Hossack, testified that he was confused over the "no

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[40] Beginning with the December 1978 report, the language was again changed to read "consideration . . . *is* given to the relative value of minority holdings." DX 374 at 2 (emphasis added).

consideration" language and thought it possibly inappropriate. He questioned U.S. News about the matter, which in turn referred it to Mr. Harris. *See* 7 Tr. 1254-66; 9 Tr. 1695-96. Harris suggested that the language be changed to read "consideration . . . may be given," PX 184, and U.S. News passed the suggested language on to Hossack. Hossack then used that language in the December 1965 report, which he prepared, as he testified, on a minority-interest basis. PX 688; 8 Tr. 1600-02; *see also* 7 Tr. 1435-36; 8 Tr. 1582.

There is absolutely no reason for this Court to disbelieve the testimony of Mr. Hossack, who prepared the 1965 report, and to find that, contrary to all appearances, it was really a control valuation. Indeed, it is most surprising to find plaintiffs arguing that it was a control report, when it is substantially similar both in methodology and in language[41] to the reports rendered during the class period. Finally, as in 1962, the Plan did not acquire a controlling interest in the Company by virtue of its 1966 purchase of an additional 20,000 shares of Class A stock. Hence, for reasons previously stated, it is highly unlikely that it would have paid a control premium for those shares.

Because the Plan did not, in fact, pay a control price for any of its 50,000 shares of Class A stock, it is not necessary to further probe the merits of the "consistency" theory.

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[41] As noted, the methodology used in the 1965 report was an even "purer" minority-interest methodology than that used in reports performed during the class period. Similarly, as pointed out, *supra* p. 1522, it was not until 1978 that the language was changed to read "consideration . . . is given." Hence, the language in the reports rendered during the class period, but prior to 1978, was identical to that in the 1965 report. If that language by itself denotes a control valuation, then plaintiffs' claims accruing during the first half of the class period must fail by plaintiffs' own admission.

iii. The "control block" theory

Plaintiffs' "control block" theory holds, simply, that because the Plan held a majority of the Company's outstanding shares, its holdings should have been valued on a control basis. To some extent, it draws support from Rev.Rul. 59-60, which indicates that the size of the block of stock to be valued is one consideration to be weighed in the balance. *Id.* Sec. 4.01(g), 1959-1 C.B. 239. Plaintiffs go further, however, and appear to argue that it is *the* factor to consider and that the number of shares that happened to have been deposited with the Plan is determinative of how those shares should have been valued.

The parties agree, and the relevant tax authorities hold, that the "fair market value" of property such as the Plan's stock is "the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of relevant facts." Treas.Reg. § 20.2031-1(b), 26 C.F.R. § 20.2031-1(b). This formula was recited, or at least paraphrased, in the annual appraisals, beginning with the May 1962 report. While this formulation has long had wide application to all aspects of federal taxation, *U.S. v. Cartwright*, 411 U.S. 546, 551, 93 S.Ct. 1713, 1716, 36 L.Ed.2d 528 (1973), it appears within the portion of the IRS regulations dealing with the valuation of property for estate tax purposes. That fact must be borne in mind in looking to tax authority for guidance in determining how the Company's stock should have been valued. It must also be remembered that, while Article Fifth establishes that tax authority controls questions of valuation arising thereunder, this is not a tax case. Moreover, the directive to look to tax law is subject to ERISA's mandate that employee benefit plans be operated in such a way as to effectuate their essential purposes. In short, while tax principles in general, and estate tax principles in particular, are implicated in a valuation of the Plan's stock, this is not a case in which—at the valuation dates

in question—property was to change hands. Therefore, the teachings of the relevant authorities must be applied with some degree of circumspection.

Returning to the "willing buyer/willing seller" formulation, the important question is how to apply that test to a situation in which individuals, who are members of an entity holding a majority block of stock, are paid cash benefits based upon the appraised value of that stock. The question becomes "Who was buying and selling what?"—and it is not an easy question to answer.

Defendants start from the premise that the Plan was not a holder of stock, much less of control, but rather was only a mechanism that enabled employees, who could not otherwise have afforded to buy out the Lawrence family's holdings, to acquire beneficial ownership of the Company. That view is amply supported by the testimony of Mr. Harris, who helped devise the plan for reorganization. *See* 59 Tr. 11,318-19, 11,345-46. It is also supported by the testimony of Mr. Much, who stated that the economic reality underlying the Plan was that its participants were something less than minority shareholders, who liquidated their individual interests in the Plan in a series of minority transactions. *See* 54 Tr. 10,416-18, 10,475-77.

Plaintiffs argue, however, that regardless of the manner in which participants settled their Plan accounts, the Plan itself held an "asset" in the form of a majority block of U.S. News stock. Since that block entitled the Plan to exercise control of the Company—for which a "willing buyer" would pay a premium—each Plan participant, they maintain, should have shared ratably in a control valuation of that "asset."

While that argument has a surface appeal, it also suffers from two fatal defects. First, just as the "current value" theory, it confuses the valuation of a plan's assets for purposes of determining the solvency of the fund from which benefits are to be paid, on the one hand, with the

determination of the level of benefits to be paid according to whatever formula the terms of the plan provide, on the other. The two are not necessarily the same. Moreover, even if the Plan's 50,000 shares were to be valued as a discrete "asset" for the purpose of determining benefits, the valuation of those shares on a minority basis was perfectly reasonable under the circumstances.

Essential to an application of the "willing-buyer/willing-seller" test is the perspective from which the property is being viewed. In estate tax cases, the interest is valued "at the time of the decedent's death. . . ." Treas.Reg. § 20.2031-1(b), 26 C.F.R. § 20.2031-1(b). Nevertheless, there is some confusion as to whether one views the interest as it existed in the decedent's hands, *see, e.g., Estate of Curry v. United States,* 706 F.2d 1424, 1427 (7th Cir.1983); Fellows & Painter at 918 n. 82, or at some metaphysical midpoint after the decedent's demise, but before his interest vests in the legatee. *See Estate of Bright v. United States,* 658 F.2d 999, 1001 (5th Cir.1981) (*en banc*). The distinction becomes important in situations where the property is worth more (or less) in the hands of the transferor than in those of the transferee.

Both *Curry* and *Bright* involved situations in which the property being valued might have been worth more if viewed solely from the decedent's perspective or from the legatee's perspective after the interest passed.[42] The holdings of both *Curry* and *Bright* can be reconciled with each other when one considers that neither court relied upon what either the decedent or the legatee might have done with his or her interest, but rather focused upon what a *hypothetical* "willing seller" would have sought to do and what a *hypothetical* "willing buyer" would have accepted. Hence, in *Curry*, the court looked to the way in which such parties would have sought to maximize their own

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[42] The facts of *Bright* and *Curry* will be discussed in more detail, *infra*.

utility from a hypothetical arm's-length sale. 706 F.2d at 1428-29. Similarly, the *Bright* court examined the value to such hypothetical parties of the interest that passed at death, not the interest that existed prior or subsequent to that passing. 658 F.2d at 1005-07.

Still, even when one restates the "willing-buyer/willing seller" test as above, so as to make it more relevant to non-estate tax cases, the test remains somewhat inapplicable to the present situation. It seems to be inconsistent with ERISA's requirement that a plan be managed according to its terms to substitute for the plan a "hypothetical willing seller." In other words, a strict application of the *Bright* formulation would require the Court to inquire only into what a hypothetical seller would do with the Plan stock, not what the Plan fiduciaries would have done after considering what was in the best interests of the Plan and its beneficiaries under the particular circumstances in question. Hence, to the extent that the valuation clause of Article Fifth must be read consistently with ERISA, the appropriate test for assessing the valuation of the Plan's stock should be whether that valuation is consistent with the administration of the Plan according to its terms. That restatement of the test, moreover, does not represent a great departure from tax valuation principles. When applying the "willing-buyer/willing seller" test, a court may consider the "actual facts" impinging upon the value in question, *Estate of Andrews v. Commissioner*, 79 T.C. 938, 956 (1982), as long as the court does not give way to consideration of the "subjective intention" of the parties. *Curry*, 706 F.2d at 1431. *See also* Dep't of Labor P/Opinion 77-78A (1977) (actual intention relevant to valuation under ERISA).

To be sure, if the Plan were to have sold its holdings to a third-party, as it did in 1984, it would have been entitled to control price for its shares. While such a sale could have taken place during the class period, it is also the case that the Company could have exercised its option

to call the shares, blocking any sale to an outsider. In such a situation, it is not clear that the Plan would have been entitled to a control price from U.S. News, for reasons that will be discussed shortly. Similarly, if the Plan declined, as it did during the class period, to sell its holdings, it is even more doubtful that it would have been appropriate to value its holdings at a premium representing "control" that it did not in fact exercise. Defendants' expert Mr. Shannon Pratt pointed out that such a valuation could have resulted in an improper dilution of the interests of participants who remained in the Plan. Specifically, persons leaving the Plan would have received benefits based upon value in the Plan that was not to be realized. Insofar as payment of such benefits would have drained cash from the Plan, the Plan might have been forced to sell off parcels of stock at a minority price,[43] which would have left remaining participants receiving less per share so that departing participants could be paid more. *See* 62 Tr. 11,969-70.

The reason why the Plan most likely could not have obtained a control price for its shares from U.S. News is that, by buying back those shares, U.S. News would not be buying "control" of itself and, hence, would not have been willing to pay a control premium. Thus, such a situation would have been different from that in which a corporation buys back shares from a shareholder or control group that actually does exercise control. In that situation, the corporation might be willing to pay a premium in order to dissolve the control previously exercised by the seller.[44]

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[43] Of course, it could be argued that in such a situation the Plan could have simply sold out its holdings at a control premium. Yet nothing in ERISA requires that a plan function in such a way that it must liquidate itself after a given period of time. Indeed, as noted earlier, the driving force behind the enactment of ERISA was a concern that plans should remain solvent.

[44] Indeed, to fend off a tender offer, a corporation might be willing to pay a premium for *minority* blocks of stock.

The Plan, however, was not a controlling shareholder, despite its majority holdings.

What constitutes "control," such that a purchaser of a majority block of shares would be willing to pay a premium for them, is best summarized by Chester Gougis, one of defendants' experts. *See* 68 Tr. 13,135-37. Mr. Gougis stated that the benefits of control are threefold. First, the purchaser of control may be able to run the acquired company together with his other businesses in such a way as to increase overall efficiency—to achieve "synergies" of operation. Second, the purchaser might be able to access the cash reserves or other resources of the acquired corporation, for use in a way that he deems especially useful. Finally, a controlling shareholder is able to choose a management team to run the corporation consistent with policies that are agreeable to him. The first two factors primarily speak to the question of whether a purchaser will pay a control premium for a majority block of stock. In the case of a purchase of the Plan's holdings by U.S. News, it is clear that the Plan could not offer the Company any "synergies," cash or resources that the Company did not already have. The third factor speaks as well to what the controlling shareholder can do within the corporation itself. As holder of a majority block of U.S. News stock, the Plan could do almost nothing in this regard.

It is undisputed that throughout the class period, the Plan did not exercise "control" of the Company in any sense of the word. U.S. News was managed by its directors, who incidentally appointed the Profit-Sharing Committee. The Profit-Sharing Committee was comprised of two directors and two other "lay" employees. The director members of the Committee certainly did not—and were not required to—attempt to manage the Company differently as Committee members than as directors.[45] For its

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[45] ERISA specifically permits the appointment of corporate officers

part, the Plan as "majority shareholder" did not have any say in the management of the Company. For one thing, its status as "majority shareholder" would have become relevant, under the terms of the voting trust, only with respect to extraordinary corporate events requiring a majority vote of the beneficial owners of the stock. And even in the event that such a matter would have come to a vote, there is no reason to expect that those entitled to so vote the Plan's shares—that is, the Committee—would have voted otherwise than using the same best judgment that they employed as directors. As for the other two Committee members, whose function it was to tend to the more ministerial aspects of Plan administration, nothing in ERISA would have required them to second-guess the directors in matters of corporate management. *Cf.* ERISA § 405(c)(1), 29 U.S.C. § 1105(c)(1) (plan may allow named fiduciaries to delegate certain responsibilities among themselves or to others). In short, the Plan did not function as a control entity within the Company, and its fiduciaries were not required to set themselves up as a second board of directors. Rather, the Plan and its fiduciaries functioned exactly as it was contemplated that they would. As Mr. Harris testified, it was never meant that the Plan be a "shareholder" of the Company as such; it was only to be a conduit for the beneficial ownership of U.S. News by its employees.

A question remains, however, of whether the Plan *could* have exercised "control" of the Company in some meaningful way. It has already been established that the Plan was not a ready instrument for toppling existing management. Certainly, members of the Board were not about to depose themselves, and any replacements would have been voted in by the voting trustees, themselves members of

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and directors as plan fiduciaries. *Id.* § 408(c)(3), 29 U.S.C. § 1108(c)(3). As long as no conflicts of interest arise, such a fiduciary may continue to serve in a dual capacity. *See Donovan v. Bierwirth*, 680 F.2d 263, 271 (2d Cir.1982).

the Board, rather than by the Profit-Sharing Committee.[46] Even assuming, however, that the Committee could have set itself up apart from the Board, it is not clear that such an arrangement would have advantaged Plan beneficiaries to any extent.

Such an "independent" Committee could have only acted independently with respect to extraordinary corporate matters, matters in which it could have used its majority vote. If the Company were to remain employee owned, the Plan would have been limited to attempting to secure for itself and its beneficiaries a greater share of the corporate assets.[47] Yet while this sounds like a plausible course of action in theory, its implementation would likely have run afoul of Delaware corporation law. Under Delaware law, a majority shareholder, to the extent that it can make its

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[46] While it is true that the Plan could have used its majority vote to terminate the voting trust, it is also true that the board of directors could remove members of the Committee without cause. Hence, it is unlikely that the Plan Committee, under any scenario, would have been in a position to oust the current management, which would have likely meant ousting themselves.

In addition to not being in a favorable position to vote in new management, the Committee could not have acted to limit, by formal agreement, the discretion of the directors in managing the Company. *See Abercrombie v. Davis*, 35 Del.Ch. 599, 123 A.2d 893, 898-900 (1956), *rev'd on other grounds*, 36 Del.Ch. 371, 130 A.2d 338 (1957); *see also Chapin v. Benwood Foundation, Inc.*, 402 A.2d 1205, 1210-11 (Del.Ch.1979), *aff'd*, 415 A.2d 1068 (Del.1980).

[47] The theory that the Plan could acquire additional assets from the Company was put forward by counsel for the *Richardson* plaintiffs, and was probably inspired by a 1981 draft report from U.S. News counsel suggesting that one way to deal with the Plan's "liquidity crisis" would be to divide U.S. News and Madana into two separate corporations and give the Plan an 80% holding in Madana. *See* PX 524 at 19-21. Assuming that that arrangement would have met applicable legal standards, it still does not lend support to a theory that the Plan could have willy-nilly gobbled up the assets of U.S. News "Pac-Man"-style.

power felt, is under a duty not to act to the detriment of minority shareholders. *See, e.g., Matter of Reading,* 711 F.2d at 517; *Harriman v. E.I. DuPont de Nemours & Co.,* 372 F.Supp. 101, 105-06 (D.Del.1974); *Weinberger v. UOP, Inc.,* 409 A.2d 1262, 1265 (Del.Ch.1979). Similarly, under ERISA, a plan fiduciary who is also a director or majority stockholder owes fiduciary duties as well to non-plan shareholders. *Donovan v. Cunningham,* 716 F.2d at 1473 n. 38. Hence, there might have been significant legal impediments to the Plan's attempted appropriation of additional assets.[48]

If the Plan choose to force a sale or merger of the Company, of course, it would have been able to realize some or all of the value in its stockholdings, but only with the cooperation of the Board. First, if the Plan attempted to sell its shares to an outsider without prior Board approval, the Company could have called the shares and would probably not have had to pay a control price for them. Second, if the Plan desired to sell off the Company's assets or otherwise dissolve or liquidate the corporation, it could not have moved in that direction without Board

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[48] While an employee became a participant in the Plan before he was entitled to become a holder of bonus stock, his Plan interest vested some years *after* his acquisition of common stock. Hence, there were holders of common stock who did not have vested interests in the Plan. Therefore, there was at least in theory the possibility that, under certain conditions, the interests of profit-sharing and stock bonus plan participants might have diverged.

In addition to the impediments imposed by fiduciary duties owed to the non-Plan stockholders, the limit on maximum contributions to a qualified employee benefit plan might have prevented the Plan from acquiring additional assets from the Company. *See* IRC §§ 401(a), 404(a)(3)(A), 415(a)(1)(B), (c), 26 U.S.C. §§ 401(a), 404(a)(3)(A), 415(a)(1)(B), (c).

Finally, any transfer of corporate assets would have likely required Board approval under Delaware law. *See* 8 Del.Code Ann. § 141(a); Article Tenth, U.S. News Articles of Incorporation.

initiation of such a plan for sale or dissolution. *See* 8 Del. Code Ann.: Gen.Corp.Law §§ 271, 275(a) (Michie 1983 & Supp.1986). In short, there was really nothing the Plan could have done on its own to enjoy or realize control of the Company. Therefore, there is no reason why its shares should have been valued on the premise that the Plan could have exercised such control.

Finally, even if the Plan could be said to have enjoyed control of U.S. News, it does not follow that its members should have shared ratably in a control value, merely because they owned "undivided" interests in the Plan assets. The cases cited to the Court do not support the proposition that an undivided fractional interest in a control block of stock should be valued on a control basis. In *Bright*, discussed earlier, the decedent and her husband each owned an undivided one-half interest in majority blocks of stock in several corporations. The stock was held jointly as community property under state law and was subject to partition at the death of one of the spouses. The decedent left her one-half interest to a trust for the benefit of her children, naming her husband as trustee. In valuing the decedent's interest for estate tax purposes, the court refused to hold that those holdings constituted one-half of a control block of stock. The court reasoned that decedent's interest could not be aggregated with that of her husband on the basis that they held the stock jointly during their marriage, for the fact of death terminated that joint ownership. 658 F.2d at 1002-07. More importantly, her interest could not be so aggregated with her husband's after death, even though he might not have been willing to sell either the shares he held in trust or his own shares individually, thus foregoing a receipt of a control price. *Id.* at 1005-07. Instead, the decedent's interest had to be valued standing alone, and standing alone it was only a minority interest. *Id.*[49]

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[49] In *Propstra v. United States*, 680 F.2d 1248, 1251-53 (9th Cir.1982),

Admittedly, the determinative factor in the *Bright* court's ruling could be said to have been its concern that decedent's interest be valued at the moment of death or partition, not before when the decedent and her husband jointly held the stock, nor after when Mr. Bright served as trustee of decedent's shares in addition to retaining his own shares. In the present case, however, we must deal with a situation in which, on the valuation date in question, various individuals concurrently held undivided, minority interests in a majority block of stock. In this way, the situation appears to be more like that of Mr. and Mrs. Bright before the latter's death. However, if before the death of Mrs. Bright, her interest could have been valued—for some purpose—on a pro-rata control basis, it would have been appropriate to do so only because she and her husband jointly and actively exercised control. *Cf.* 658 F.2d at 1002. Yet the individual members of the Plan did not jointly exercise any type of control, and neither did the Plan itself. The mere fact that the Plan members' interests, if added together, amounted to a majority of the outstanding shares in the Company does not, standing

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the court similarly held that an undivided one-half interest in real estate should be valued standing alone. And in *Estate of Andrews*, 79 T.C. at 954-56, the court declined to hold that a minority interest in several family-held corporations should be accorded a pro-rata control value based on the analogous "family attribution" doctrine, whereby the separate interests of family members are aggregated on the theory that the family as a whole exercises control.

In *Estate of Curry*, the court did rule that the decedent's holdings of non-voting stock should have been valued equally with his control block of voting stock as a matter of law and that the district court's failure to give such an instruction to the jury was prejudicial error. 706 F.2d at 1427-30. The court reasoned that, because the decedent *himself* had overall control, his additional shares of non-voting stock should not have been considered apart from his control block because no "willing buyer" would have purchased them separately. The case does not stand for the proposition that a separable, minority position in a majority block of stock should, if valued separately, be accorded a pro-rata control value.

alone, entitle them to a pro-rata control value. The aggregate minority shares of a corporation always add up to 100 percent; that does not mean that a 5 percent shareholder enjoys a corresponding share in the control of the corporation.

As a final note, it might be instructive to look again at *Donovan v. Cunningham*. There the court held that it was legal error for the district court to have considered that, because a minority block of shares of employer stock sold by the sole shareholder to an ESOP, when aggregated with the seller's remaining shares, amounted to a controlling interest in the company, the minority block could have, consistent with ERISA, been sold for a control price. 716 F.2d at 1473 n. 38. The district court reasoned that, since the seller, who was also a fiduciary of the plan, was under an obligation to vote his shares only in the best interests of the plan beneficiaries, his shares and the minority ESOP shares formed one control unit. In rejecting this rationale, the circuit court emphasized that, not only did the seller owe fiduciary duties to other, non-plan shareholders, but that the fiduciary duties that he owed the plan shareholders were not sufficient to afford them the benefit of control "by operation of law." The lesson to be learned from *Cunningham*, then, is that minority parcels of stock in a larger entity, may—and even should—be valued on a minority basis, even though the parcels are aggregated under a common fiduciary who owes the same duties to all the shareholders. Such a result is fairly commonsensical when one considers again that, merely because the directors of a corporation owe fiduciary duties to all minority shareholders, it does not follow that those shareholders each enjoy a ratable share in the control of the corporation. It seems that, on the whole, two or more persons may be entitled each to a pro-rata share of a control value only where they together actively participate in the control of the company.[50] Such was not, however, the situation at U.S. News.[51]

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[50] In other words, such division of a control value might be appro-

Because the Court finds that the U.S. News Class A and common stock were properly valued on a minority-interest basis, much of the testimony of plaintiffs' experts becomes irrelevant to the resolution of the issues remaining in this proceeding. The Court has found unpersuasive the testimony of Mr. Hempstead that a control valuation was appropriate. Hence, the Court does not consider further the testimony of Mr. Kobak and Mr. Harps that the Company's publishing business and its real estate holdings should have been given substantially greater weight than was accorded them by American Appraisal. The Court will return to the question of whether sufficient weight was given the Company's underlying assets, *infra* pp. 1530-33, but emphasizes now that it views plaintiffs' experts' treat-

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priate in situations similar to that giving rise to the "family attribution" doctrine, discussed *supra* note 49.

[51] In arguing that no discount should have been applied to the Plan stock, plaintiffs rely in part on an article by a Mr. Lawrence Lipkin, *The Theory of Minority Discount in Regard to ESOP Shares of Closely-Held Corporations*, 26 Valuation 130 (1980). Lipkin argues that minority discounts are inappropriate as applied to shares held in trust by fiduciaries for the benefit of the stock's equitable owners. His theory, which is concededly a departure from current law and practice, proceeds from the premise that the fiduciaries of the trust cannot "discriminate" against the interests of the trust beneficiaries and that, therefore, no discount should be taken to reflect the fact that the control entity—the trust—could take action that would be adverse to the best interests of the beneficiaries.

The problem with that theory is that it assumes that a minority discount reflects majority "discrimination" against minority shareholders, which discrimination presumably would be prohibited under ERISA. In fact, a minority discount only reflects that fact that the holders of minority interests in a corporation are not in a position to run the corporation. *See, e.g., Beerly v. Department of the Treasury*, 768 F.2d 942, 946-47 (7th Cir.1985), *cert. denied*, ___ U.S. ___, 106 S.Ct. 1184, 89 L.Ed.2d 301 (1986); *Estate of Andrews*, 79 T.C. at 953; Fellows & Painter at 903-04. It is quite clear by now that the U.S. News employees did not run the Company in any way, either directly or indirectly. The Company was managed by the directors, as plaintiffs must concede after contending that they managed the Company poorly.

ment of those assets wholly unsupported by applicable valuation techniques.

C. Discrimination Under ERISA

Plaintiffs maintain that the valuation of the Plan's stock during the class period on a minority basis unfairly discriminated against them in the payment of benefits in favor of those U.S. News employees who benefited from the 1984 sale. The Court has already ruled that no such discrimination took place, that the 1984 sale was an event different in kind from the annual valuations. 627 F.Supp. at 1170-71. There is no reason to rule otherwise now.

It is true that the tax regulations under which a plan covered by ERISA may qualify for favorable tax treatment prohibit discrimination in the payment of contributions or benefits in favor of certain categories of participants, primarily highly compensated employees, officers, or shareholders of the employer company. *See* IRC § 401(a)(4), 26 U.S.C. § 401(a)(4); Treas.Reg. §§ 1.401-1(b)(1)(ii), 1.401-4(a)(1)(i), 26 C.F.R. §§ 1.401-1(b)(1)(ii), 1.401-4(a)(1)(i); Rev.Rul. 80-155, 1980-1 C.B. 85. The U.S. News plan complied with these regulations throughout the class period; at least there is no evidence that the Plan was in danger of losing its tax-qualified status. Moreover, the regulations cited certainly do not prevent a plan from being terminated or liquidated, which was what happened in 1984. And while ERISA prescribes conditions under which such a termination or liquidation may be undertaken, *id.* §§ 4041-68, 29 U.S.C. §§ 1341-68, those provisions of the statute are primarily concerned with the orderly winding up of plan business and the discharge of accrued liabilities in accordance with the terms of the plan. Nothing in ERISA requires that any gain realized from the liquidation of plan assets be distributed to persons who are no longer participants in the plan. Consequently, the allocation of the 1984 sale proceeds to current employees in accordance with their Plan interests did not, as a matter of law,

discriminate against those employees who had left the Company in prior years.

D. Underlying Asset Values

The conclusion that the Company's stock was properly valued on a minority-interest basis largely disposes of the question of whether and to what degree American Appraisal should have considered the value of the Company's underlying assets. As discussed *supra* p. 1526, in a control valuation, of course, asset values loom large, for a sale of a controlling interest in a corporation allows the buyer to realize the value inherent in those assets. This is so because the buyer may redirect management policies as he desires. In a minority valuation, however, assets may or may not play an important part in arriving at a per-share figure, because a minority shareholder cannot reach those assets. A minority shareholder is not in a position to influence or change management policies. Generally speaking, if the valuation being undertaken is of a business, such as U.S. News, that produces goods or services, primary consideration will be given to the earnings of the company and the resultant return on a shareholder's investment. Rev.Rul. 59-60, Sec. 5(a), 1959-1 C.B. 242. Conversely, if the company is primarily an investment or holding company, the appraiser may accord greater weight to its underlying assets. *Id.* In either case, no precise formula can be established and adhered to in determining the relative weight to be assigned to asset values as against earnings. *Id.* Sec. 7, 1959-1 C.B. 243. Accordingly, a great deal of discretion must be left to the appraiser performing the valuation. *See, e.g., Donovan v. Cunningham,* 716 F.2d at 1473. *Cf. Sommers Drug Stores Co. Employee Profit-Sharing Trust v. Corrigan Enterprises, Inc.,* 793 F.2d at 1461-62 (fair market value of stock is not necessarily the quotient of asset values over shares outstanding).

As discussed earlier, American Appraisal's valuation methodology was for the most part a mixed approach that

combined earnings analysis with some consideration of underlying asset values. Only in 1978 was no consideration at all given to the latter factor. The appraiser responsible for the 1978 valuation testified that he was uncomfortable with an asset-value approach, because he felt that such an approach was based upon the unrealistic assumption that minority shareholders could obtain value from assets over whose disposition they had no control.[52] *See* 28 Tr. 5570, 5579; 29 Tr. 5915-16, 5950-51 (Russell). In prior years, consideration had been given to underlying asset values because the Company either experienced poor earnings, as in 1976 and 1977, or had suffered actual losses, as in 1975. In subsequent years, because development plans were becoming ever more imminent, some amount of weight was given to the Company's real estate holdings. In 1981, of course, the value of the new real estate joint ventures was reflected in the appraisal.

Having reviewed the testimony of the various appraisers who performed the annual valuations, as well as the testimony of the parties' expert witnesses, the Court concludes that American Appraisal's mixed valuation approach adequately took account of the Company's underlying assets. In valuing a going concern, in the absence of factors tending to diminish the reliability of a strict earnings approach, asset values are generally accorded little weight. *See, e.g., Cochran v. Commissioner*, 7 T.C.M. 325, 337 (1948); *Hooper v. Commissioner*, 41 B.T.A. 114, 129 (1940), *acq.*, 1940-1 C.B. 3; *see also* 69 Tr. 13,293 (Gougis). If, on

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[52] The appraiser who performed the 1974 valuation similarly thought it unrealistic to give any weight to asset values and did not do so in his final report. However, in testing his preliminary figures, he did perform a number of calculations that took asset values into account. Those "checks" confirmed for him the reasonableness of the values he obtained from his earnings approach. *See* 22 Tr. 4357-58; 23 Tr. 4424-28, 4435-43, 4513-15 (Walker).

the other hand, less confidence can be placed in an earnings approach, a consideration of asset values may be required, such as when a company has or will face losses or holds substantial investment assets. *See, e.g., Gallun v. Commissioner*, 33 T.C.M. 1316, 1320-21 (1974) (operating business in declining industry; investment assets of far greater value); *see also* Fellows & Painter at 911-12. While it is true that, throughout the class period, U.S. News held certain investment *opportunities*, these did not comprise the sort of investment assets that would have counseled a more searching asset valuation. *Estate of Andrews* is not to the contrary.

In *Estate of Andrews*, the Tax Court was required to arrive at a *de novo* valuation of certain stockholdings that formed part of the decedent's gross estate. It is true that the court took pains to emphasize its feeling that underlying asset values were important to such a valuation. 79 T.C. at 946-51. However, it also noted that a consideration of asset values was appropriate because of the nature of the companies whose stock was being valued. The court found that they were neither real estate investment companies, strictly speaking, whose investment value was passed through to its stockholders regardless of actual earnings, nor wholly operating companies, whose investment value was limited by its earnings and dividend-paying histories. *Id.* at 944-46. Rather, the companies were actively involved in the "ownership, operation, and management of commercial real estate properties," *id.* at 939, and also held some liquid assets such as cash, stocks and bonds. *Id.* Accordingly, the court gave some degree of weight to the value of the companies' underlying assets. Then, in keeping with standard valuation practice, the court discounted the gross value of the stock to reflect a minority position in the companies being valued. *Id.* at 956-57.

Even if this Court were required to make a *de novo* redetermination of the value of the Company's stock in

each of the class years, it would be inclined to follow, more or less, the approach used by American Appraisal. As defendants' expert, Mr. Gougis, has cogently argued, U.S. News was, prior to 1981, primarily a publishing company, which held some undeveloped investment property. 69 Tr. 13,328. In 1981, of course, the Company's situation changed dramatically, yet American Appraisal's approach changed, too. Prior to 1981, the appraisers did, where appropriate, accord value to the Company's real estate consistent with the contemporaneous state of development plans for those holdings.[53] And so, when development of the real estate became a reality, the projected income from the joint ventures was added to the value of the publishing business. While at all times the appraisers discounted the asset values before adding them to the value of the operating business, as noted in the discussion of *Andrews, supra,* such a minority discount is perfectly in accord with standard appraisal practice. *See also Sommers Drug Stores,* 798 F.2d at 1462; *Gallun,* 33 T.C.M. at 1320-21; Fellows & Painter at 910-18. The discounts that American Appraisal took were typically in the 15-35 percent range, well within standard practice.[54]

Other than the Company's real estate holdings, plaintiffs point to certain other assets that they say were not properly accounted for in the annual appraisals. One such "asset" was the Company's "deferred subscription liability," which represented funds that U.S. News received through

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[53] Even plaintiffs' real estate expert, Mr. William Harps, acknowledged that development studies prepared in anticipation of development plans yet to be drawn up would not be relevant ~~to~~ a current appraisal of the subject property. *See* 33 Tr. 6599; 34 Tr. 6766-69. Moreover, because it was reasonable to give only limited weight to the value of the Company's real estate, it is certainly not necessary to inquire into how a real estate appraiser would have valued the land in each year of the class period.

[54] The court in *Gallun,* for instance, applied a 55 percent discount. 33 T.C.M. at 1321.

the sale of subscriptions that were to be later filled. Under its accrual method of accounting, the Company treated those funds as a liability, because they represented the future costs associated with producing and distributing the magazines that had already been paid for. Perhaps because U.S. News placed the funds in short-term investments to increase the "buffer" between monies received and anticipated future expenses, plaintiffs and their experts, Mr. Kobak and Mr. Hempstead, have termed this liability an "asset." Moreover, they claim it was an asset excess to business, whose value should have been reflected in the value of the Company's stock. For their part, defendants have more than adequately pointed out that the "asset," if it were indeed such, was necessary to keep the publishing business operating in the black and that the treatment of it as a liability was perfectly reasonable. *See* RDX 73 at 3. Moreover, even if it should have been termed an asset rather than liability, there would have been no reason to value it separately in the appraisals. The income that it generated, which was used in the publishing operations, was reflected in the appraisals as part of the Company's net income. Separate treatment would have been appropriate, if at all, only in a control valuation, which might have assumed that new management could have found another way of utilizing the funds in question.[55]

Other assets that American Appraisal allegedly failed to properly take into account were U.S. News holdings of

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[55] Indeed, plaintiffs' expert, Mr. Kobak, seems to have made just such assumptions.

In a related argument, Mr. Hempstead maintains that the contributions that the Company made to the Plan were really disguised dividends that should have been added back to net income. Yet, as defendants point out, the contributions were based upon employee compensation, not company profits, and thus should not be considered "dividends." Moreover, given the standard of review applicable here, the Court sees no reason to become embroiled in tangential accounting issues.

Atex, PPI and other investments. The record more than amply demonstrates, however, that at least until 1981, these investment holdings would have been of marginal, if any, concern to investors in U.S. News stock. In 1981, the Company exchanged its Atex stock for shares in Eastman Kodak and thus realized an extraordinary gain. In keeping with standard appraisal practice, American Appraisal excluded this extraordinary gain from net income in its earnings analysis. It did, however, include a year's worth of dividends on the Kodak stock in its income figures. *See* PX 21 at 19, 30. Even by 1981, the Company's investments in PPI and its other ventures, while potential income-producers, had not yet materialized as significant sources of revenue. Accordingly, they would have held little attraction for potential investors in U.S. News–and, thus, figured minimally in the appraisals. *See* PX 21 at 13. In choosing market multiples to be applied to the 1981 earnings, however, American Appraisal did take into consideration the favorable future outlook of those investments. *See id.* at 29-30. In short, American Appraisal's attention to the Company's various investment assets fairly met the criterion of reasonableness.

E. Marketability Discount

Quite apart from whether the stock of U.S. News should have been valued on a control or minority basis, plaintiffs challenge American Appraisal's application of a 10 percent discount to reflect the stock's lack of marketability. Plaintiffs maintain that, because the Company always exercised its option to repurchase the bonus stock, there was a "ready market" for that stock, rendering use of a marketability discount inappropriate. As for the Plan stock, they contend that a marketability discount can never be applied to a control block of stock.

It should be stated at the outset that the use of a marketability discount did not run counter to the admonition in Article Fifth against considering the effect that

the restrictions on transfer contained therein would have had on the value of the stock.[56] Rather, the appraisal reports stated explicitly that the marketability discount was meant to reflect the fact that, quite apart from such restrictions, the stock of a closely-held company is generally less attractive to potential investors than publicly traded stock. *See, e.g., Sommers Drug Stores,* 793 F.2d at 1462; *Hooker Industries, Inc. v. Commissioner,* 44 T.C.M. 258, 267 n. 26 (1982); *Estate of Andrews,* 79 T.C. at 953, 957; *Cochran,* 7 T.C.M. at 337; Fellows & Painter at 920-21 & n. 89.

1. As to the Common Stock

Plaintiffs argue that, because U.S. News invariably repurchased employees' bonus shares, the Company created a ready market for that stock, which should not have been discounted, then, for any lack of marketability. Nevertheless, as defendants' expert Shannon Pratt points out, the Company was under no obligation to repurchase the stock. It had, rather, an option to *call* the stock; employees did not have the option to "put" the stock to the Company.[57] Moreover, even when it did decide to repurchase parcels of stock, the Company could—and from time to time did—exercise its option under Article Fifth (g) to pay for the stock on terms that would not have been accepted gladly by an outside investor.[58]

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[56] If those restrictions had been considered, they would have most likely required application of a greater discount. Certainly stock is worth less if it can be disposed of of only upon the holder's death or termination from employment.

[57] A marketability discount might be appropriate even where the holder of the stock does have "put" option. *See Hooker Industries,* 44 T.C.M. at 267 n. 26. *But see* S. Pratt, *Valuing a Business: The Analysis and Appraisal of Closely-Held Companies* 342 (1981) (where shares are consistently redeemed under put option for cash, zero marketability discount might be justified).

[58] Article Fifth (g) gave the Company the option of repurchasing the

Although it probably would not have been justifiable for American Appraisal to have excluded a marketability discount from its valuation, in view of the fact that U.S. generally did redeem the shares for cash, the appraisers consistently concluded that a modest discount of 10 percent was appropriate. Experts for both sides have recognized a wide range of possible discounts. Defendants' expert, Mr. Gougis, stated that discounts generally fall in the range of 20 percent to 60 percent. 69 Tr. 13,252. Plaintiffs' expert Mr. Hempstead testified that he had in the past used discounts of 40 percent and 50 percent. 48 Tr. 9498. It would be impossible, then, for the Court to conclude that American Appraisal's use of a 10 percent discount was anything but reasonable.

2. As to the Class A Stock

While American Appraisal did not separately analyze the question of whether a marketability discount was appropriate for the Class A stock, based upon the expert testimony and case law, the Court concludes that is was.

In supporting use of the discount, Mr. Pratt testisfied to a number of scenarios in which the restricted marketability of the Plan's holdings would have made itself felt. 61 Tr. 11,890-93. First, if the Plan sold shares directly to U.S. News employees, those shares, which would have been deemed converted to common stock under Article Fourth (d)(ii), would have been subject to the restrictions on transfer. Similarly, if the Plan sold its shares to U.S. News, they would have been, again, converted to common and made subject to the transfer restrictions. Finally, it should be noted that, if the Class A stock were sold to a third party, it would still represent a block of stock in a com-

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bonus shares in exchange for 15-year, subordinated notes, bearing 5 percent simple interest. Mr. Pratt testified that these terms should be considered relatively unfavorable. *Cf.* Pratt, *Supra* note 57, at 342.

pany whose stock was not widely traded.[59] As such, it would be relatively less attractive to an investor, rendering application of a marketability discount—contrary to plaintiffs' assertion—appropriate. *See Estate of Andrews*, 79 T.C. at 953 (marketability discount may be applied to a control block); Fellows & Painter at 920-21 (same); *see also* Pratt, *supra* note 57, at 148 (marketability discount reflects stock's "illiquid[ity]," not the size of the block valued). Mr. Pratt also noted, that, if the Plan sold its holdings in a public offering, it would have been required to pay registration fees and commissions amounting to at least 10 percent of the stock's value. In a way, such costs associated with the sale of a block of stock can be said to be equivalent to, or to reflect, the stock's relative lack of marketability.

On the whole, then, the modest 10 percent marketability discount that American Appraisal applied generally to the U.S. News stock in the aggregate was perfectly appropriate as applied specifically to the Class A stock.

F. Miscellaneous Challenges to Particular Appraisals

In addition to the issues pertaining to all the appraisals, issues which have been resolved by the preceding discussion, plaintiffs challenge several of the appraisals in a number of particular respects. They assert that the 1973 appraised value was not supported by a formal written report and that the 1974 and 1977 appraisals contain certain numerical errors.[60] Each of these challenges will be considered in turn.

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[59] This would remain true quite apart from the question of whether the purchaser could have the transfer restrictions eliminated.

[60] Plaintiffs, of course, assert that the 1978 and 1980 year-end appraisals must be rejected as the products of collusion between U.S. News and American Appraisal. That challenge has already been considered, *supra* pp. 1511-13. The Court there concluded that the appraisals were not tainted by improper conduct and that the values arrived at were otherwise within the range of reason.

1. The 1973 Appraisal

It is undisputed that the 1973 valuation was not supported by a written report, although one was requested. Plaintiffs maintain that, in the absence of such a report, the 1973 value must be rejected. That conclusion does not necessarily follow.

First, a number of credible witnesses have established that it is the conclusion of value, not the written report, that is important. Indeed, some very large transactions have apparently turned upon values that were supported only by a single-page "letter" report. Moreover, if the conclusion is reasonable, a report would serve only to memorialize the appraiser's thinking. There is nothing, however, to suggest that the 1973 per-share value was not reasonable or, more specifically, was too low. If anything, judging by the movement during the period in the price of the Company's stock, it was too high. The 1973 value was determined to be $80.00 per share, while the 1970 value[61] was $65.00; the 1974 and 1975 values, also $65.00; and the 1976 value, $77.00.

Second, if the 1973 value is to be rejected, it must be replaced by something else. Yet plaintiffs have failed to offer an alternative minority value, and since it is not left with this Court to determine such a value itself *de novo*, the 1973 value of $80.00 must stand. Of course, if the Court were to make such a determination, it might determine that it would be appropriate to interpolate a figure based upon values rendered between 1970 and 1975 or 1976, which figure would necessarily be lower than $80.00 per share.[62]

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[61] Unfortunately, reports for 1971 and 1972 were not rendered either, and the values determined for those years do not otherwise appear to be available.

[62] The value that defendants' expert, Mr. Gougis, determined in his "blind" appraisal for 1973 was only $64.00.

2. The 1974 and 1977 Appraisals

Plaintiffs challenge the appearance in the 1974 and 1977 reports of figures that they argue are objectively incorrect. In the 1974 appraisal, for instance, it appears that the appraiser used an income figure from the unaudited financial statements, which he then failed to correct upon receiving the final statements. The difference would have amounted to some $4.00 per share. Mr. Walker, the appraiser in question, testified that, because any valuation is an approximation at best, he saw no reason to change his figures to reflect actual earnings.[63]

Similarly, the appraiser who prepared the 1977 report made several minor computational errors, which at most would have increased the per-share value by $1.50 or $1.75. While it is hard to expect plaintiffs to be content with an appraisal report that contains known, quantifiable errors, it is also true that, in the greater scheme, those errors are *de minimis*. First, the errors are so small as to be negligible when one considers that an appraisal is only an approximation, whose results are often rounded down to the nearest dollar, or five- or ten-dollar increment. Second, it certainly does not fall to this Court to check each of the challenged appraisals for perfect arithmetic accuracy. As pointed out earlier at some length, the defendants' decision to award benefits each year based upon the current appraised value of the Company's stock will be overturned only if in any year that decision was unreasonable. It certainly was not unreasonable for defendants to have paid out benefits based upon an appraisal that turned out later to have been "off the mark" by less than two dollars per share.[64]

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[63] While one might find that attitude rather cavalier at first blush, it should be noted that Mr. Walker has achieved one of the highest distinctions that his profession has to offer. *See supra* p. 1502.

[64] It should also be noted that the estimates of plaintiffs' experts—even different estimates by the same expert—varied widely, sometimes by as much as 90 percent.

G. Failure to Disclose Appraisal Reports

Plaintiffs have charged, rather obliquely, that defendants' failure to provide them with each year's appraisal report was an independent violation of ERISA. What relief they seek, however, is not clear.

It is true that ERISA enumerates certain types of documents which must automatically be provided to plan beneficiaries. These include all "instruments under which the plan was established or is operated." *Id.* § 104(b)(2), 29 U.S.C. § 1024(b)(2).[65] Yet there is nothing to suggest that the appraisal reports were documents falling into that category. They certainly were not involved in the "establish[ment]" of the Plan, nor was the Plan "operated" under them. Indeed, as defendants point out, the only information that they contained relevant to the Plan was the final per-share value for each year. Yet that was information that everyone at U.S. News knew; it was certainly not kept secret. Finally, even if the Plan improperly failed to make the appraisal reports available under section 104(b)(2), no private right of action is implied under that section that would entitle plaintiffs to any form of relief. *Bruch v. Firestone Tire & Rubber Co.*, 640 F.Supp. 519, 533 (E.D.Pa.1986).

More importantly, however, plaintiffs have not shown that they have been damaged by the failure of the Plan to distribute the reports. They have not shown that they would have sued sooner if they had had the reports, and even if they attempted to make such a showing, in view

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[65] ERISA § 104(b)(4), 29 U.S.C. § 1024(b)(4), provides that copies of such documents must be furnished if *requested*. If such a request is denied, fines or other relief against the plan administrator may be sought under section 502(c), 29 U.S.C. § 1132(c). That provision, however, only applies to denials of requested information. *Bruch v. Firestone Tire & Rubber Co.*, 640 F.Supp. 519, 533 (E.D.Pa.1986). Because the record shows that none of the plaintiffs ever sought to see an appraisal report and was denied, section 502(c) is inapplicable.

of the disposition of this proceeding, it would have been irrelevant. They have not sought any specific relief relative to the reports, and since this proceeding does not turn upon a resolution of the statute of limitations issue, the reports' non-distribution as it relates to concealment or notice is, again, irrelevant.

In short, plaintiffs' claim under section 104 appears simply as a make-weight and a non-meritorious one at that. It should be noted, too, that during the extended trial of this matter no individual plaintiff nor any other class member testified that he or she asked to see an appraisal report. Further, the record shows that, had such an employee asked to see an appraisal report, it would have been made available to him. Employees were indeed given much information as to how the stock was valued. *See supra* pp. 1510-11.

H. Actions of the Fiduciaries

Throughout this proceeding plaintiffs have turned loose a steady steam of criticism at the officers, directors, and corporate managers responsible for important policy decisions at U.S. News. Plaintiffs charge those defendants with a lack of knowledge and clear understanding of their responsibility and an inability to make the decisions necessary to protect adequately their interests and the interests of the employee-shareholders in general. The case law is clear that ERISA fiduciaries need not themselves possess experience or expertise in accounting, appraisal or actuarial sciences as they relate to the many facets of plan administration, as present here. The law is also clear that fiduciaries may rely on expert and professional advice in administering a plan. *See Witmeyer v. Kilroy,* 788 F.2d 1021, 1024-25 (4thCir.1986); *see also Donovan v. Cunningham,* 716 F.2d at 1474; *cf. Aaronson v. Lewis,* 473 A.2d 805, 816 (Del.1984) ("business judgment rule" allows director to reasonably rely upon others' expertise).

Over the course of the class period, as years prior, the director-fiduciaries secured and relied on the expertise of American Appraisal. As to problems relating to the Plan and valuation issues, they also relied upon the knowledge and judgment of treasurers Padrutt and Naimoli, who in turn obtained and relied on the legal advice from Don Harris and other attorneys in his firm Finally, the Ernst & Whinney accounting firm prepared audits of the Profit-Sharing Plan's financial statements. In those audits, Ernst & Whinney certified that reasonable methods were utilized in the valuation of the Class A stock. The fiduciaries received sound advice and counsel on ERISA and other matters as required under relevant case law.

I. Statute of Limitations

As stated at the beginning of this Memorandum Opinion, plaintiffs' claims can be grouped into two categories. The first consists of those claims premised upon intentional or fraudulent conduct and includes those for breach of the fiduciary duty of loyalty under ERISA § 502(a)(3), securities and common-law fraud, common-law breach of fiduciary duty, and unjust enrichment. The second comprises claims based upon arbitrary, capricious, negligent or imprudent conduct and embraces those for breach of the fiduciary duty of care under ERISA § 502(a)(3), for benefits due under ERISA § 502(a)(1)(B), and for negligence and negligent misrepresentation. The statute of limitations as to claims in the first category may be tolled, if at all, under the doctrine of fraudulent concealment. Tolling of the statute under that doctrine requires that plaintiffs show (1) that defendants engaged in a course of conduct designed to conceal evidence of their alleged wrongdoing and that (2) they were not on actual or constructive notice of that evidence, despite (3) their exercise of due diligence. *Hobson v. Wilson*, 737 F.2d 1, 33-36 (D.C.Cir.1984), *cert. denied sub nom. Brennan v. Hobson*, 470 U.S. 1084, 105 S.Ct. 1843, 85 L.Ed.2d 142 (1985). The statute may be tolled as to claims in the second category either under the

fraudulent concealment doctrine[66] or under the discovery rule. The latter doctrine applies in certain cases in which a plaintiff who has relied upon the advice or expertise of another—generally, a professional—and who is injured thereby is not in a position to discover the injury within the limitations period. In such cases, the plaintiff's cause of action will not be said to accrue until he discovers, or with reasonable diligence could discover, the injury. *See, e.g., Byers v. Burleson,* 713 F.2d 856, 860 (D.C.Cir.1983). While the doctrine has been applied in cases of legal malpractice, as in *Byers,* as well as medical and architectural malpractice, *see, e.g., Wilson v. Johns-Manville Sales Corp.,* 684 F.2d 111, 115-21 (D.C.Cir.1982); *Ehrenhaft v. Malcolm Price, Inc.* 483 A.2d 1192, 1201-02 (D.C.1984), it seems that the local courts would extend the doctrine to a case such as this, if the situation presented itself.

As discussed in connection with defendants' Rule 41(b) motions, *supra,* the record reveals no evidence of fraudulent conduct, either in connection with the alleged underlying wrongs, or subsequent thereto.[67] Hence, the doctrine of fraudulent concealment simply does not come into play, and any claim accruing outside the limitations

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[66] In cases of fraud, the concealment is most often tied into the underlying wrong. *Hobson,* 737 F.2d at 33 & n. 102. Where a defendant is charged with wrongful but not fraudulent activity, the wrongs must be concealed by subsequent fraudulent acts. *Id.*

In addition, any claim under ERISA § 502(a)(3) may only be tolled under the fraudulent concealment doctrine incorporated in section 413, 29 U.S.C. § 1113; claims under section 502(a)(1)(B) may be tolled by whatever rules local law provides.

[67] To the extent that it is relevant, defendants did disclose the existence of the phantom stock awards. They appeared on the balance sheets distributed to employees as of 1977, PX 144-48, and were the subject of remarks made by Mr. Sweet at the 1978 shareholder luncheon, PX 11 at 24-25, as well as a memorandum to employees dated September 18, 1978. PX 10 at 9.

period would be time-barred.[68] Similarly, because the Court finds that plaintiffs were at least on constructive notice of facts underlying their cause of action well before the commencement of these proceedings, tolling of the statute under the discovery rule would be defeated as to any claim falling outside the limitations period.[69]

Plaintiffs in *Foltz* commenced the first of the two suits upon learning that an offer had been made to buy the Company for somewhat more than twice its last appraised value. As defendants point out, then, the knowledge or realization that the Company could be sold for more than the appraised value of its stock was in fact sufficient to put plaintiffs on notice of a potential claim. Yet the record is fairly clear at this point that plaintiffs were at least on constructive or inquiry notice of that disparity in value throughout the class period.

Taking the 1979 year-end appraisal as an example, one notes that employees were told at the 1980 shareholder luncheon that the real estate was worth potentially $14 to $15 million. PX 12, Q & A at 9-10. Employees were also told that the Company had more than $17 million in net assets, PX 12 at 34-25, and that the 1979 appraised price per share was $125. *Id.* at 31. From the year-end 1979 balance sheet distributed to employees, anyone interested could have learned that there were 61,638 shares outstanding and by doing the appropriate multiplication could have discovered that the appraised price per share yielded an aggregate value for the Company's stock of only some $7.7 million, dramatically less than either the real estate alone, or the total net asset value.

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[68] The relevant statutes of limitation are set out at 627 F.Supp. at 1149 n. 5, 1156 & n. 26; 639 F.Supp. at 600-01 & n. 13.

[69] In addition, the six-year statute of limitations, otherwise applicable to a claim under ERISA § 502(a)(3), is reduced by notice on plaintiffs' part to three years from the date of such notice. *Id.* § 413(a)(2), 29 U.S.C. § 1113(a)(2).

Examples such as the above can be multiplied, encompassing each year of the class period.[70] Suffice it to say that any employee who was curious—and, as discussed above, there were plenty who had misgivings about the way in which the Company was valued—could have learned that the aggregate minority value of the Company, or the product of the appraised per-share price and the number of shares outstanding, was always substantially less than the "true" value of the real estate—that is, its book value multiplied by a factor of three, or some equivalent value gleaned through the employees' general awareness of land values in the area.

In sum, even were the Court not to rule for defendants in these proceedings, most of plaintiffs' claims would be time-barred under the relevant statutes of limitations.

IV. CONCLUSION

This class action litigation was triggered by the impending sale of the entire U.S. News Company for a much greater per-share price than that which plaintiffs had received for their stock and profit-sharing interests upon their retirement or separation. Plaintiffs claim that they were unaware of the true value of the entire Company, that it was never disclosed to them, and that they became aware of it only when it was announced in December 1983 that the Company was to be sold. Plaintiffs have failed to prove and support their claim in that regard. Defendants presented a substantial and credible record to the contrary.

An issue of key importance to plaintiffs' case was whether U.S. News stock was properly valued on a minority basis during the class period. While plaintiffs presented abundant testimony and evidence covering a wide

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[70] *See generally* Defendants' Proposed Findings of Fact and Conclusions of Law with Respect to the Court's Ruling on Their Rule 41(b) Motions ¶¶ 218-35, 239-42; 639 F.Supp. at 602-03 & n. 16.

range of subjects and theories, much of their presentation had little relevance or probative value. The Court concludes that it was at least reasonable to have valued both classes of U.S. stock on a minority-interest basis and to have given only such weight to underlying asset values as the appraisers saw fit. In view of that determination, it becomes unnecessary to engage in further analysis of other challenges to U.S. News management practices during the class period. The outcome of the annual appraisals was not the result of any sort of deliberate misconduct on the part of the several defendants.

While several directors had less input than others into the overall appraisal process, those who involved themselves more fully in that process did so in an entirely appropriate manner. Even if the directors had been inattentive in their review and acceptance of the appraisals—and they were not—rendering their reliance upon any erroneous report unreasonable, such inattention could not have resulted in any harm to plaintiffs, for the appraisals during the class period were in fact perfectly reasonable and acceptable.

It is understandable that plaintiffs should be disappointed that they were unable to enjoy the fruits of the 1984 sale of U.S. News to Mortimer Zuckerman. Be that as it may, there is no basis in the law as it presently stands for distributing the proceeds of that sale otherwise than has been done. As long as it was appropriate to value the Company's stock on a minority-interest basis during the class period, defendants cannot be faulted because the gain realized from the Company's subsequent sale did not benefit the former as well as current employees of U.S. News. Defendants are no more to be held accountable for such a situation under ERISA than they would have been at common law. Of course, Congress could have structured ERISA in such a way as to address problems such as that created by the sale of an employee-owned company, but it did not.

Plaintiffs have failed to support their several claims by a preponderance of the evidence. They are not entitled to a judgment declaring defendants' liable. The consolidated complaints in this matter should be dismissed. Defendants shall submit by July 6, 1987, an order consistent with this Memorandum Opinion.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-0447

Supplemental Civil Actions
Nos. 84-0447 and 85-2195

CHARLES S. FOLTZ, *et al.*,
Plaintiffs,

v.

U.S. NEWS & WORLD REPORT, INC., *et al.*,
Defendants,

DAVID B. RICHARDSON, *et al.*,
Plaintiffs,

v.

U.S. NEWS & WORLD REPORT, INC. *et al.*,
Defendants,

CHARLES S. FOLTZ, *et. al.*,
DAVID B. RICHARDSON, *et al.*,
Plantiffs,

v.

MORTIMER B. ZUCKERMAN, *et al.*,
Supplemental Defendants.

FILED
AUG 21 1987
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

FINAL ORDER OF JUDGMENT

The above-captioned *Foltz* and *Richardson* actions were consolidated for trial by this Court's Order of March 3,

1986. The factual and legal issues involved were fully considered by the Court, sitting without a jury, and a decision was duly rendered. The Court's Memorandum Opinion filed on June 22, 1987 set forth appropriate findings of fact and conclusions of law, pursuant to Fed. R. Civ. P. 52(a).[1] On the basis thereof, it is this 21 st day of August, 1987,

ORDERED, ADJUDGED and DECREED

1. That judgment is entered for defendants on all counts and the claims of the *Foltz* and *Richardson* plaintiffs in the above consolidated actions, with the exception of plaintiffs' claims in Supplemental Civil Actions Nos. 84-0447 and 85-2195 (as provided for in paragraphs 5 and 6, *infra*), are dismissed with prejudice on the merits as to all defendants.

2. That the judgment entered in the *Foltz* action shall be binding against all members of the *Foltz* class, which is composed of those persons described in paragraph (a) of the Court's Order Declaring a Class Action and Directing Notice to Class Members, filed September 10, 1984 (and as amended by the Court's Orders of November 20, 1984, August 28, 1985 and May 30, 1986), who did not request exclusion from the class. For the purposes of this Final Order of Judgment, the Court finds that such persons are members of the class and that the class was properly certified.

3. That upon entry of judgment pursuant to this Final Order, the preliminary injunction relating to monies held

[1] In a related action, Estate of Ben Grant v. U.S. News & World Report, Inc., *et al.*, C.A. No. 86-0156, summary judgment was entered for defendants and the plaintiff's claims were dismissed with prejudice on June 12, 1986. In accordance with paragraph 4 of this Order, and in view of the disposition of the *Foltz* and *Richardson* actions as provided for herein, any contingent cross-claims and contingent counterclaims brought in *Grant* are dismissed as moot in a separate order of this date.

by the U.S. News Profit-Sharing Plan, previously entered in the *Foltz* and *Richardson* actions on June 14, 1985 and July 15, 1985, respectively, shall be dissolved, provided however that this judgment and the dissolution of said preliminary injunction shall be stayed and remain in effect, pursuant to Fed. R. Civ. P. 62(c), pending the expiration of time allotted to seek appellate review before the United States Court of Appeals for the District of Columbia Circuit and 10 days thereafter. Within the allotted time, plaintiffs should file a timely application for appropriate relief with the Court of Appeals.

4. That any and all contingent cross-claims and counterclaims asserted by any defendant in the above consolidated actions are dismissed as moot on the basis of this ruling on the plaintiffs' claims.

5. That plaintiffs' claims in Supplemental Civil Actions Nos. 84-0447 and 85-2195 are dismissed as moot. Notwithstanding the dismissal of the Supplemental actions, the Stipulation of Supplemental Defendants, dated July 24, 1986, shall remain in effect through appeal and final adjudication of this matter.

6. That the Court shall retain jurisdiction of Supplemental Civil Actions Nos. 84-0447 and 85-2195 for the purposes of ruling on the outstanding claims relating to plaintiffs' request for sanctions and attorneys' fees and costs.

7. That this Court shall also retain jurisdiction of the consolidated actions for purposes of considering the appropriateness of an award of attorneys' fees and costs as to the defense of some or all of plaintiffs' claims. Within thirty (30) days from the entry of this Order, counsel for the parties shall submit briefs addressing fully the question of taxation of attorneys' fees and costs in the original consolidated actions. A single brief shall be filed by counsel for each side.

8. Other than with respect to the Court's retention of jurisdiction over certain matters as set forth above, there is no just reason to delay entry of this Final Order of Judgment as provided for in Fed. R. Civ. P. 54(b).

/s/ Barrington D. Parker
Barrington D. Parker
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-0447

Civil Action No. 85-2195

Supplemental Civil Actions
Nos. 84-0447 and 85-2195

CHARLES S. FOLTZ, *et al.*
Plaintiffs,

v.

U.S. NEWS & WORLD REPORT, INC., *et al.*
Defendants.

DAVID B. RICHARDSON, *et al.*
Plaintiffs,

v.

U.S. NEWS & WORLD REPORT, INC., *et al.*
Defendants.

CHARLES S. FOLTZ, *et. al.*
DAVID B. RICHARDSON, *et al.*
Plantiffs,

v.

MORTIMER B. ZUCKERMAN, *et al.*
Supplemental Defendants.

FILED
SEP 4 1987
CLERK, U.S. DISTRICT COURT
DISTRICT OF COLUMBIA

ORDER
(Amending Final Order of Judgment—August 21, 1987)

The *Foltz* and *Richardson* plaintiffs have filed in these consolidated actions a motion for a stay pending appeal and for modification of the August 21, 1987 Final Order of Judgment. Rule 62(c), Fed. R. Civ. P. and Rule 8(a), Fed. R. App. P. Their motion addresses the third provision of the order relating to preliminary injunctions entered on June 14, 1985 and July 15, 1985 relating to monies held by the U.S. News Profit-Sharing Plan. The Court has considered plaintiffs' application and for good cause shown, it is this 3rd day of September, 1987,

ORDERED

That paragraph 3 of the August 21, 1987 Final Order of Judgment is amended as follows:

3. That upon entry of judgment pursuant to this Final Order, the preliminary injunction relating to monies held by the U.S. News Profit-Sharing Plan, previously entered in the *Foltz* and *Richardson* actions on June 14, 1985 and July 15, 1985, respectively, shall be dissolved, provided however that this judgment and the dissolution of said preliminary injunction shall be stayed and remain in effect, pursuant to Fed. R. Civ. P. 62(c), pending the expiration of time allotted to seek appellate review before the United States Court of Appeals for the District of Columbia Circuit, and upon the filing of a timely Notice of Appeal, and a contemporaneous application for maintenance of the injunctions pending appeal, until such further action by the Court of Appeals on the application.

/s/ Barrington D. Parker
Barrington D. Parker
United States District Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civ. A. No. 84-0447.

Charles S. FOLTZ, *et al.*,

Plaintiffs,

v.

U.S. NEWS & WORLD REPORT, INC., *et al.*,

Defendants.

Jan. 15, 1986.

MEMORANDUM OPINION

BARRINGTON D. PARKER, Senior District Judge:

This class action suit is brought against U.S. News & World Report magazine ("U.S. News" or "Company") by a group of its former employees who terminated their employment during the period from 1974 through 1981.[1] The litigation was triggered by the sale, in October 1984, of U.S. News to real estate magnate and developer Mortimer Zuckerman for approximately $176 million. Plaintiffs complain that the stock of the Company, which constituted the corpus of the employee profit-sharing plan, was wrongfully and grossly undervalued for a number of years prior to the sale and that employees who retired during the

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[1] For a fuller treatment of the background of this litigation, see this Court's pre- and post-remand opinions concerned with plaintiffs' Motion for Preliminary Injunction, 608 F.Supp. 1332 and 613 F.Supp. 634 (D.D.C.1985), as well as the Circuit Court opinion remanding the case for further proceedings, 760 F.2d 1300 (D.C.Cir.1985).

designated class period are owed unpaid benefits and entitled to damages under various legal theories.

The parties have completed substantial pretrial discovery and have filed cross motions for summary judgment. The issues presented are set forth, *infra* at 1148-1149. This Memorandum Opinion provides the Court's ruling on those motions.

BACKGROUND

In 1962, U.S. News was reorganized to provide, consonant with the wishes of David Lawrence, the magazine's founder and owner, that employees of the Company would share in its ownership and profits. Accordingly, Articles of Incorporation authorized the issuance of Class A and common stock, each having full and equal voting rights. The employees could not sell or transfer their interests during their employment and upon termination were required to offer them to the Company at values established through mutual agreement or by outside appraisers.

The Profit-Sharing Plan of U.S. News ("Plan"), a noncontributory plan, was in existence when the Articles were adopted. By 1967, the Plan had acquired 50,000 shares of Class A stock, which it held throughout the class period. In addition, U.S. News was obligated to make contributions to the Plan. Over the years, the Plan acquired a modest portfolio of investment securities, which was of limited value as compared with the Class A stock. The Plan was managed by a Profit-Sharing Committee ("Plan Committee"), appointed by the Company's Board of Directors, while its accounts were maintained by a trustee.[2] Each plan participant was allotted an account balance, based upon his salary and term of service. Upon retirement, the participant received payment, either lump sum

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[2] Since 1979, Mercantile-Safe Deposit & Trust Company.

or periodic, as determined by the appraised value of the Class A stock held by the Plan.

Beginning in 1963, a stock bonus plan was adopted which allotted to certain employees common stock known as bonus or anniversary stock. The employee could not sell or encumber the stock, absent Company approval. Upon retirement or termination, each employee was, at the option of U.S. News, required to sell back his shares of stock to the Company. Payments of bonus stock were made every five years, beginning with the fifth year after an employee joined the magazine. The number of shares allotted an employee was based upon his salary and length of service.

Together with most of the common stock, the 50,00 shares of Class A stock held by the Plan were placed in a voting trust. This arrangement gave the voting trustees effective control over the management of U.S. News, and placed them in a position where they could elect themselves to the Board and then appoint themselves to the Plan Committee. While Board members were not entitled to participate in the stock bonus plan, beginning in 1968, the Board did award stock to its directors. This stock, carried on the corporate books as debt, represented a right to deferred compensation only, with no voting privileges. The plaintiffs have labeled the shares "phantom stock."

As noted, the amount of benefits that each employee received upon separation hinged upon the value of the Company's stock. Since there was no market for the stock, U.S. News hired an independent appraiser, defendant American Appraisal Associates ("American Appraisal"), to arrive at a fair value for the shares. Plaintiffs challenge the validity of those appraisals, because, as they allege, U.S. News and American Appraisal worked together to eliminate from the calculation of the Company's net worth, the value of several parcels of undeveloped real estate held by U.S. News, land which, upon sale of the magazine, added considerably to the price paid per share. The real

estate was held by Madana Realty Company, a subsidiary of U.S. News. Plaintiffs also allege that American Appraisal improperly valued the stock in other ways, which are discussed in greater detail, *infra* at 1170-1173.

The original complaint was filed in early 1984. Since then it has undergone several amendments. At this time the defendants are U.S. News and eight former members of its Board of Directors, the Profit-Sharing Plan, American Appraisal, and the Madana Realty Company. To redress what wrongs they feel they suffered at the hands of those defendants, plaintiffs press a variety of statutory and common-law claims. In Count I of the recently filed Fifth Amended Class Action Complaint,[3] U.S. News, the former directors, and American Appraisal are charged with violations of the Securities Exchange Act of 1934. Count II asserts claims for benefits and damages against U.S. News, the director-defendants, American Appraisal, and the Profit-Sharing Plan under various provisions of the Employee Retirement Income Security Act of 1974 ("ERISA"). In Counts III, IV, V and VI, U.S. News, the director-defendants, and American Appraisal are sued variously for common law and constructive fraud, breach of fiduciary duty, unjust enrichment, negligence and negligent misrepresentation.[4]

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[3] While leave to file a fifth amended complaint was granted subsequent to the briefing of the first round of dispositive motions, *see* Order of October 4, 1985, the parties have addressed for the most part whatever additional issues were presented in that complaint, save for those issues raised by the new claim under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1961 et seq. That claim was stricken from that complaint as it was allowed to be filed. In addition, plaintiffs have withdrawn their antitrust claim, after realizing that it was without merit. What new claims the amended complaint has raised have been treated in motions for summary judgment of American Appraisal, U.S. News and the director-defendants, filed on November 27 and 29, 1985. Those motions are considered in this Memorandum Opinion.

[4] Count VII of the amended complaint pressed ERISA claims against

Plaintiffs have moved for partial summary judgment against all the defendants on the ERISA claims. The defendants, in turn, have moved for summary judgment on all counts, pleading that the relevant statutes of limitation bar most, if not all, the claims. In addition, U.S. News, the director-defendants, and American Appraisal press a variety of theories according to which they argue that each of the statutory and common-law claims are fatally flawed as a matter of law.

Subsequent to the filing of their Fifth Amended Complaint, plaintiffs renewed in substance their earlier filed motion for partial summary judgment. U.S. News, the director-defendants and American Appraisal also filed additional motions for summary judgment directed to the new claims raised by the Fifth Amended Complaint.

This Memorandum Opinion will discuss the issues presented by the parties' several motions in the following order:

Part I, pp. 7 to 26, discusses the motions of the defendants challenging the complaint on grounds that it was untimely filed and barred by the relevant statutes of limitations.

In part II, pp. 26 to 42, the Court deals with defendants' motion to dismiss plaintiffs' securities law claims.

Parts III and IV, pp. 43 to 71, are concerned with the parties' pleadings and representations on the ERISA claims. Part III, pp. 43 to 57 considers defendants' challenge to the plaintiffs' claims under ERISA. Part IV, pp.

Mercantile and current members of the Plan Committee, charging them with having breached fiduciary duties owed plaintiffs by approving a disbursement, in July 1985, of a portion of those Plan assets not held back by the preliminary injunction issued on June 14, 1985. Those claims were dismissed without prejudice. *See* Order of November 26, 1985, 623 F.Supp. 60.

57 to 70, addresses plaintiffs' motion for partial summary judgment on those claims.

Part V, pp. 70 to 75, discusses ERISA's preemptive effect on plaintiffs' common-law claims and Section VI, pp. 75-84, is concerned with whether the defendants are entitled to summary judgment on those claims.

ANALYSIS

At this stage in the pretrial proceedings, it is not the Court's task to attempt to resolve the factual issues raised, *Rodway v. United States Dep't of Agriculture*, 482 F.2d 722, 727 (D.C.Cir.1973), but merely to determine whether there are indeed material factual issues that need be presented more fully to the ultimate trier of fact. While discovery in this case fills volumes, the Court may not, tempting as it may be to do so, remove the resolution of disputed issues of fact from the fact-finder, in an effort to whittle down the litigation as originally framed.

PART I

DO THE RELEVANT STATUTES OF LIMITATION BAR PLAINTIFFS' CLAIMS?

A threshold issue presented at this juncture is whether the applicable statutes of limitation bar any or all of plaintiffs' claims[5] relating to the undervaluation. All of the defendants seize upon this defense. As plaintiffs must concede, the applicable limitations periods would work to bar most or all of their claims unless they have been the vic-

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[5] The applicable limitations period for the ERISA claims is three or six years, *see* discussion, *infra* at 1156; for the securities claims, two years, *see Wachovia Bank & Trust Co. v. Nat'l Student Marketing Corp.*, 650 F.2d 342, 346-48 (D.C.Cir.1980), *cert. denied*, 452 U.S. 954, 101 S.Ct. 3098, 69 L.Ed.2d 965 (1981) (D.C. Code Ann. § 2-2413(e) applies to cases filed after 1977); and for the common-law claims, three years, *see* D.C.Code Ann. § 12-301(7), (8) (Michie 1981 & Supp.1985).

tims of fraudulent concealment and were not otherwise on notice of their claims prior to filing suit. Yet because the questions of concealment and notice raise factual issues that very as to each group of defendants, analysis of the limitations bar must consider the participation of each of the various defendants. Accordingly, the role of U.S. News, its directors and the Profit-Sharing Plan will first be addressed, followed by a consideration of the conduct of American Appraisal.

A.

AS TO U.S. NEWS, THE DIRECTORS, AND THE PROFIT-SHARING PLAN

The Court has already visited the question concerning the extent to which the principals of the Company, its Profit-Sharing Plan, and the other centers of corporate control enjoyed overlapping jurisdictions. *See* 608 F.Supp. at 1336, 1344. Suffice it to say at this point that there is ample evidence in the record to support a finding that there are disputed issues of fact as to whether a pattern of fraudulent concealment engaged in by the directors may be imputed both to the magazine as a corporate entity and to the Plan. For the present discussion, then, it will be assumed that if the record reveals the presence of factual issues suggesting fraudulent concealment by the magazine's principals, the statute of limitations will be tolled as to U.S. News and the Plan, as well.

1. Federal Law Claims

Before analyzing the factual record, it might be well to set out briefly what is involved in a claim of fraudulent concealment.[6] In a recent ruling on the doctrine, Judge

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[6] The analysis of a fraudulent concealment claim, pressed in an action governed by federal law, must follow the law as developed by federal courts. *Hobson v. Wilson*, 737 F.2d 1, 33 & n. 100 (D.C.Cir.1984). Claims predicated upon District of Columbia law, however, must follow local tolling precedents. *Richards v. Mileski*, 662 F.2d 65, 70 (D.C.Cir.1981), even when filed in federal court.

Edwards of our Circuit Court spoke of two situations in which fraudulent concealment may toll the statute of limitations. The first is that in which acts of concealment in addition to the primary wrong are necessary to effect concealment. *Hobson v. Wilson,* 737 F.2d 1, 33 (D.C.Cir.1984). The second is that in which the concealment is implicit in the nature of the wrong. *Id.* In a case in which the defendants have actively concealed the wrong, the statute is tolled until the wrong is actually discovered. *Id.* at 34 n. 103 (citing *Tomera v. Galt,* 511 F.2d 504, 510 (7th Cir.1975)). In such a situation, the plaintiff need not exercise due diligence to avail himself of the doctrine of equitable tolling. In the case of "self-concealing" wrongs, the court stresses that due diligence is essential. *Id.* (citing *Wachovia Bank & Trust Co. v. Nat'l Student Marketing Corp.,* 650 F.2d 342, 349 (D.C.Cir.1980), *cert. denied,* 452 U.S. 954, 101 S.Ct. 3098, 69 L.Ed.2d 965 (1981)).

It is not seriously alleged that any of the defendants engaged in any course of conduct—subsequent to the perpetration of the primary wrongs—designed to conceal those wrongs. The question then is whether the wrongs were indeed "self-concealing," and not merely such as to innocently evade plaintiffs' notice. Yet the doctrine of fraudulent concealment has no applicability at all if the plaintiff was on notice of the wrong complained of *Hobson,* 737 F.2d at 35.

Notice means one of two things. First, a plaintiff is on notice of a particular cause of action when he is apprised of facts unique to that cause of action. Second, a plaintiff will be considered on inquiry notice if he has not "exercise[d] due diligence in conducting [an] inquiry" upon knowledge of facts short of those that would give rise to a cause of action. *Id.* at 35 n. 107. In other words, while a prospective plaintiff does not have to file suit on a hunch, *id.* at 39, once his suspicions have been aroused, once he has perceived some degree of injury, he is put under a

duty to exercise due diligence to inquire further as to a possible claim.

As a final note before considering the factual record, it is recognized that a court should be wary of granting summary judgment where, as here, issues of fraud, notice, intent, and the like are present. *See generally* 10A Wright, Miller & Kane, *Federal Practice and Procedure: Civil* § 2730 at 246-55 (1983). It is also recognized that to sustain their burden, defendants must show that there is no genuine issue of material fact in dispute and that they are entitled to judgment as a matter of law, *Perry v. Block*, 684 F.2d 121, 126 (D.C.Cir.1982), even when the facts, and all inferences to be drawn therefrom, are seen in the light most favorable to the nonmoving party. *Weisberg v. United States Dep't of Justice*, 627 F.2d 365, 368 (D.C.Cir.1980).

With this in mind, two undisputed facts are noted at the outset. The first is that on each Voting Trust Certificate,[7] was a written notice advising the holder of his right to demand a second appraisal of the U.S. News stock. Second, under Delaware corporation law the plaintiffs had access to the appraisal reports prepared by American Appraisal and filed with agencies of that state. Both of these facts go to the issue of whether plaintiffs were diligent in their efforts to uncover matters surrounding defendants' alleged wrong-doing. But before assessing the plaintiffs' diligence, it is necessary first to determine whether there are undisputed facts indicating either that plaintiffs were on actual notice of the alleged wrongful acts or at least were on inquiry notice.

While plaintiffs contend that they did not know of facts surrounding any wrongful undervaluation of the U.S. News

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[7] Such a Certificate was issued to holders of bonus stock. A sample Certificate was identified as Plaintiffs' Exhibit 315 in Support of Motion for Preliminary Injunction. [All such exhibits will hereinafter be cited as "PX ___ "]

stock until May 1983 (when its value rose dramatically) or December 1983 (when it was announced that the magazine was to be sold), defendants argue that plaintiffs had long been on notice of the valuation techniques alleged to have been most wrongful—the minority-interest valuation of the stock and the low value placed on the real estate. Defendants also maintain that the appraisal reports, which plaintiffs claim were withheld and which contained essential information, were not critical to bringing the suit, since the plaintiffs did not have such reports or information even when they filed their complaint. What defendants overlook, however, is that prior to 1983, plaintiffs could only have garnered information that might have put them on notice of their claims from the reports, or from scattered remarks made by directors of the Company. The question that remains, then, is whether the plaintiffs learned or could have learned anything during the class period that would have put them on actual or inquiry notice as to any potential claim.

Defendants adduce the transcript of the April 8, 1974, annual shareholder luncheon, PX 37, as a prime example of the kind of notice plaintiffs received regarding the valuation of U.S. News' stock. At this luncheon, Chairman John Sweet described the way in which American Appraisal valued U.S. News' stock, comparing the stock's earnings and dividend-paying capacities to those of publicly-traded companies in similar businesses.[8] Defendants argue that this disclosure put plaintiffs on notice that U.S. News' stock was being valued according to a minority interest, because it was being compared to that of companies whose stock necessarily was being valued (by the market) on a minority-interest basis. Mr. Sweet also mentioned at the time that the real estate was carried on the

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[8] These remarks were made in the course of the question-and-answer period ("Q & A") traditionally held following the Chairman's formal report. PX 37, Q & A at 5.

books at approximately one-third of its true value. PX 37, Q & A at 12. In response, plaintiffs contend that this was totally inadequate and insufficient: that (1) they cannot be charged with knowing the significance of comparisons between U.S. News' stock with that of publicly-traded companies; that (2) in any case, Sweet's remarks could not be interpreted to mean that the real estate was valued by American Appraisal at one-third of value, because American Appraisal issued no reports for the years 1971 through 1973 and because Sweet had no personal knowledge of the valuation techniques used by American Appraisal; and that (3) in those and subsequent years, American Appraisal was not kept informed of U.S. News' real estate development plans.

To be sure, Mr. Sweet's personal knowledge of the appraisal methods utilized by American Appraisal is irrelevant to whether plaintiffs would have been put on notice of a potential claim if they had heard and absorbed what was said at the 1974 share-holder luncheon. Similarly, what American Appraisal knew with respect to U.S. News' nascent plans for developing its real estate holdings says nothing about what plaintiffs knew. The issue is, rather, whether plaintiffs understood that American Appraisal was not using the true value of the real estate in valuing the U.S. News stock.

Taking a somewhat broader view, it seems inappropriate on a motion for summary judgment to impute notice, on the basis of a few remarks made at a share-holder luncheon. What percentage of employees attended the luncheons is far from clear from the record; however, it is clear that attendance was limited to holders of anniversary stock, employees who had worked at the magazine for at least five years. It was not open to employees by virtue of their participation in the Plan. At least one deposed class representative testified that he attended only some of the luncheons. Theobald Deposition at 53-57. He further testified that he did not review prepared transcripts of those

meetings, because he felt discouraged from doing so by the conditions under which they were to be viewed.[9] Given such testimony, the Court is not prepared to hold that what defendants adduce as clear, undisputed evidence of notice stands out from the rest of the record with such clarity as to sweep aside other evidence to the contrary.

What plaintiffs knew about the relationship between the valuation of the Company's stock and the appreciation of its real estate is hardly illuminated by the fragmented deposition testimony cited by defendants. At one point in his August 10, 1984 deposition, class-plaintiff Edward Castens testified that he was aware of a dramatic increase in the value of the real estate holdings, and that because of this appreciation, he believed he was not paid adequate retirement benefits. *Id.* at 18-19. However, it is not clear from context whether Mr. Castens is testifying that now, looking back upon the historic increase in land values in the area, he believes he was underpaid, or whether he knew then that the appreciation in the real estate was not reflected in the valuations performed by American Appraisal. The only seemingly clear testimony that defendants adduce to impute notice comes from plaintiff Richard Theobald:

> Q. [Y]ou had a question as to whether the value of the stock accurately reflected the value of the real estate?
>
> A. I did.
>
> Q. And you had that question when, in the '60s and early '70s?
>
> A. Yes, all those years when things [developments in the area] were happening.

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[9] According to Mr. Theobald, Deposition at 56-57, employees could not sign out the transcripts, but had to read them through at a designated location.

Theobald Deposition, August 10, 1984, at 41. Yet in the same deposition, Mr. Theobald testified that he did not know how the real estate was in fact valued and, hence, could not really know whether the U.S. News stock was undervalued as a result of any misappraisal. *Id.* at 45. It is precisely this kind of record that prompts caution in granting summary judgment when issues of notice are raised.

Of course, ignorance of a potential claim is not enough to toll the Statute. Rather, plaintiffs' ignorance must have been caused in some way by fraudulent activity on the part of defendants.

While not clearly instances of concealment, information given out by U.S. News can, at least in certain circumstances, be said to fit plaintiff's characterization of it as "disinformation." One example of an ambiguous or misleading disclosure occurred at the 1981 annual shareholder luncheon, PX 42, when an employee asked whether the stock would be revalued once development was on track. Chairman Sweet answered that it would, PX 42, Q & A at 49-50, and in so doing may have given the impression that the stock value generally tracked the progression of U.S. News' real estate development plans. Again in a 1980 memorandum to employees, Sweet mentioned the favorable impact that development would likely have on the employees' Plan accounts, without revealing that a study conducted by the law firm of Arnold & Porter valued the real estate holdings at $37.5 million, PX 82 at 5, as opposed to American Appraisal's figure of $4.6 million, PX 20 at 13; that a development contract was soon to be closed; and finally, that certain downward adjustments were made by American Appraisal to further lower the value attributed to the property.

Other instances of apparent misconduct involved the 1978 and 1980 year-end appraisals, PX 17, 20. Plaintiffs allege in connection with the 1978 appraisal that a vice

president of an American Appraisal division telephoned U.S. News in March of 1979, giving a per share value estimate prior to the performance of an appraisal for that year. A letter of April 13, 1979 confirms that conversation. That estimated value was then apparently given to the appraiser who later undertook the valuation of the U.S. News stock.[10] The worksheets of the appraiser indicate, at that least upon initial examination, he worked backwards from the estimated value to arrive at an "appraised" value.[11] When questioned about this procedure, the appraiser admitted that he worked backwards in this fashion, Marshall Deposition, August 7, 1984, at 440, and further testified that a figure that he arrived at using the normal appraisal methodology was not used, because the prior estimate had already been released. *Id.* at 191-92.

The 1980 year-end appraisal raises similar questions. Notes taken by the appraiser during the course of an interview of U.S. News officials in connection with the appraisal seem to support plaintiffs' allegation that U.S. News and American Appraisal fixed a range within which any valuation should fall.[12] While it is unclear how awareness of this "negotiated" figure affected the subsequent appraisal, *see* Marshall Deposition at 585, such a collaboration between the defendants raises serious doubts as to the independence enjoyed by American Appraisal and the care with which it conducted the valuations of U.S. News' stock. While the conduct of the two goes primarily to the merits of plaintiffs' claims, such conduct also speaks to the issue of concealment. If the appraisals were improperly

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[10] The appraiser's worksheet bears the note: "John Hossack [the vice president in question] gave this a value of $105.00 per share." PX 66.

[11] *See* PX 71.

[12] The note in question reads: "Ray [Naimoli, U.S. News vice president and treasurer] mentioned he [and the] auditors had agreed to procede [sic] [with the] audit using [$] 150-170 [per] share." PX 96 at 106480 (interview notes, March 6, 1981). *See also* Marshall Deposition at 584.

conducted and if such impropriety was not apparent from the face of the appraisal reports, the misappraisals would constitute self-concealing wrongs.[13] *See Fink v. Nat'l Savings & Trust Co.*, 772 F.2d 951, 957-58 (D.C.Cir.1985); *Hobson*, 737 F.2d at 41.

Finally, to support their allegations that the Company followed a policy of limited disclosure of information to its employees, plaintiffs adduce a December 10, 1980 memorandum written by Chairman Sweet to certain management personnel, PX 319. The memorandum was circulated as a cover sheet for the December 10, 1980 memorandum sent to employees notifying them that the Company's real estate development plans might, at some time in the future, favorably affect their retirement benefits. The cover memorandum instructs the magazine's managers not to discuss further with the employees any relationship between U.S. News' real estate development plans and the valuation of its stock. While not dispositive, the memorandum certainly suggests behavior and an attitude on the part of senior U.S. News management consistent with fraudulent concealment.

Still, the inquiry is not quite over. To the extent that plaintiffs complain of self-concealing wrongs, they were bound to exercise due diligence in trying to discover their causes of action as soon as was practicable. While most of the plaintiffs have been deposed as saying that they did not ask to see an appraisal report nor sought reappraisal, at least one plaintiff testified that he "likely" asked to see an appraisal report during the class period. Theobald Deposition at 60-61. From plaintiffs' failure to ask for the reports, one might infer, not that plaintiffs were inatten-

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[13] Such would be the case quite apart from whether or not the appraisal reports were disclosed. It is unclear whether U.S. News did in fact make the reports available, *see* discussion, *infra*, which nondisclosure would constitute concealment even if the wrongs were apparent from the face of the reports.

tive, but either (1) that plaintiffs were not on notice of any possible wrong-doing,[14] or (2) that they believed that a request for such information would be unavailing.[15]

In view of the conflicting evidence in the record, the Court is compelled to find that there are material issues of fact as to whether plaintiffs exercised the requisite diligence.

2. Common-Law Claims

Whether the common-law claims asserted by plaintiffs are time-barred is a question that must be resolved according to District of Columbia law. Preliminarily, those claims must be segregated into two classes: those predicated upon negligence and those presupposing intentional conduct. In the first class are the claims for negligence, negligent misrepresentation, and "constructive" fraud;[16] in

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[14] If the plaintiffs had no inkling that their retirement benefits were being undervalued, then no duty to inquire about the appraisal reports or to seek reappraisal would arise. *See, e.g., Corley v. Hecht Co.*, 530 F.Supp. 1155, 1159 (D.D.C.1982). When no reason exists to question an expert opinion, such as American Appraisal's, rendered to an employee benefit plan, the plan beneficiaries are entitled to rely upon that opinion. *Buccino v. Continental Assur. Co.*, 578 F.Supp. 1518, 1524 (S.D.N.Y.1983). Plaintiffs have generally asserted that they believed U.S. News was handling the stock valuation competently. *See, e.g.*, Castens Deposition at 19, 35; Theobald Deposition at 20-21, 38.

[15] Plaintiff Theobald stated that he requested reports before the class period, but was told that they were unavailable. Deposition at 16-17. Moreover, Thelma Olson, the individual charged with keeping the reports testified that she thought they were confidential. Olson Deposition, November 9, 1984, at 36.

[16] Plaintiffs' claim for constructive fraud—"negligence combined with a duty," as they describe it, Fifth Amended Complaint ¶ 87—seems to be no more than a restatement of their negligence claims. Insofar as liability for negligent conduct always presupposes a duty owed the injured party, "negligence combined with a duty" means no more than "negligence."

the second, claims for unjust enrichment,[17] breach of fiduciary duty,[18] and fraud.

Those claims falling into the second category pose no special problem. While to be charged under District of Columbia law with fraudulent concealment a defendant must have engaged in some affirmative act to perfect that concealment, "any statement, word or act which tends to suppress the truth raises the suppression to that level." *William J. Davis, Inc. v. Young,* 412 A.2d 1187, 1192 (D.C.App.1980) (citations omitted). A pattern of conduct that would "lull the plaintiff into inaction" would be sufficient to constitute such concealment. *Id.* at 1192 & n. 15. A pattern of such conduct may very well have prevented the plaintiffs in this case from filing suit earlier; as the Court's discussion of equitable tolling as to the federal claims should make clear, the record is simply not unequivocal one way or the other.

Those claims sounding in negligence appear at first to fall outside the doctrine of equitable tolling. It seems paradoxical to argue that an actor accused of negligent—inattentive—conduct could have engaged in that conduct in such a way as to *intentionally* conceal[19] evidence of his negligence. Yet with regard to their negligence claims, plaintiffs may avail themselves of the "discovery" doctrine.

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[17] While plaintiffs' claim for unjust enrichment seems to rest upon a weak foundation, the Court is not able at this point to conclude that plaintiffs "would not be entitled to [prevail] under any discernible circumstances." *Semaan v. Mumford,* 335 F.2d 704, 705 n. 2 (D.C.Cir.1964), *quoted in National Ass'n of Gov't Employees v. Campbell,* 593 F.2d 1023, 1027 (D.C.Cir.1978). *See* discussion, *infra* at 1177.

[18] A breach of the fiduciary duty of loyalty, as opposed to the fiduciary duty of care, would seem to be an intentional wrong.

[19] After having taken the position that the wrongs allegedly perpetrated by defendants were "self-concealing," plaintiffs would be hard pressed to now maintain that they were concealed through subsequent conduct.

That doctrine comes into play in situations in which plaintiff has relied upon the representations or expertise of one more knowledgeable and in which the plaintiff's injury was such that it was not readily discernible.[20] *See Ehrenhaft v. Malcolm Price, Inc.*, 483 A.2d 1192, 1201-02 (D.C.App.1984) *Ehrenhaft* applied the doctrine to a case involving architectural malpractice; other cases have applied it to legal malpractice. *See, e.g., Byers v. Burleson*, 713 F.2d 856, 860 (D.C.Cir.1983) (applying District of Columbia law); *Weisberg v. Williams, Connolly & Califano*, 390 A.2d 992, 996 & n. 8 (D.C.App.1978). The instant case certainly raises issues of fact as to whether plaintiffs relied upon the judgments of the U.S. News management. That the resultant injury was latent rather than manifest is also hotly in dispute. In such a situation, summary judgment is not appropriate.

Conclusion

Given that material issues of fact are raised as to whether U.S. News, the director-defendants, and the Plan, through its principals, engaged in a pattern of fraudulent concealment, and as to whether plaintiffs were on actual or inquiry notice of potential claims and, if on inquiry notice, whether they exercised due diligence in following through on their suspicions, the Court will not grant these defendants summary judgment as to the statute of limitations with respect to any of the claims advanced by plaintiffs. Defendants, of course, are free to renew the issue at an appropriate time during the trial on the merits.

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[20] A potential plaintiff is still required to exercise due diligence; however, that issue has already been addressed in the Court's discussion of whether plaintiffs' federal claims were fraudulently concealed.

B.

AS TO AMERICAN APPRAISAL

1. Federal Law Claims

Unlike the other defendants, American Appraisal engaged in conduct not so easily characterized as fraudulent. And if American Appraisal's conduct does not amount to fraudulent concealment, no amount of fraudulent concealment on the part of any other actors will toll the Statute as to that defendant. "The purpose of the doctrine of fraudulent concealment is to prevent a party from profiting from his *own* wrong, so that one who conceals facts to prevent the timely commencement of a lawsuit is estopped from pleading that defense." *Greenfield v. Kanwit,* 87 F.R.D. 129, 132 (S.D.N.Y.1980). *Accord Powell v. Radkins,* 506 F.2d 763, 765 n. 5 (5th Cir.1975), *reh. denied,* 509 F.2d 576, *cert. denied,* 423 U.S. 873, 96 S.Ct. 140, 46 L.Ed.2d 104 (1975); *Cato v. So. Atlantic & Gulf Coast Dist. of Int'l Longshoremen's Ass'n,* 364 F.Supp. 489, 493 (S.D.Tex.1973), *aff'd,* 485 F.2d 583 (5th Cir.1973).

Plaintiffs have maintained throughout—in both their pleadings and oral presentations—that U.S. News and American Appraisal engaged in a conspiracy of unspecified dimensions, as to both time and nature. To be sure, any concealment by U.S. News would also toll the statute as to American Appraisal, if indeed the concealment was effected in furtherance of a conspiracy. *Greenfield,* 87 F.R.D. at 132. While the care and precision with which American Appraisal performed its function may be open to question, the record does not reveal or suggest anything in the nature of a conspiracy between the two save with regard to the 1978 and 1980 appraisals. Accordingly, if the statute is to be tolled as to American Appraisal, it is because of its own acts of concealment.

Except for those years, plaintiffs would be hard pressed to demonstrate that American Appraisal engaged in any

acts of concealment. In the first place, it was not that company's responsibility to see that its reports were distributed to the U.S. News employees. Its responsibility was ended when the reports were transmitted to the Board of Directors.[21] More importantly, as conceded by counsel for the class at oral argument, American Appraisal consistently disclosed its appraisal methodology in its reports. Transcript of Motions Hearing of October 16, 1985, at 16.[22] For every year that American Appraisal rendered appraisals, the reports indicated what weight, if any, was being given to the Company's real estate holdings and that it was valuing the Company's stock on a minority-interest basis, as well as discounting the stock's value because of its non-marketability.

As indicated previously, the appraisals conducted for the years 1978 and 1980 give the Court pause. It may well be that in those years, American Appraisal, acting together with U.S. News, intentionally under-valued the magazine's stock to the detriment of the U.S. News employees. And as discussed above, such conduct, not revealed on the face of the appraisal reports, may indeed constitute a self-concealing wrong, so as to toll the statute.

2. Common-Law Claims

For the most part, what has been said with regard to the common-law claims brought against the other defendants applies as well to American Appraisal.[23] Those

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[21] Plaintiffs' assertions to the contrary notwithstanding, American Appraisal is not a fiduciary, within the meaning of ERISA, with respect to the magazine's employees. *See* discussion of ERISA claims, *infra*. Hence, American Appraisal was under no special obligation to see that the reports got into the hands of the U.S. News employees.

[22] Plaintiffs' counsel also stated at another time that the marketability discount was disclosed in the appraisal reports. Transcript of Motions Hearing of October 7, 1985, at 51.

[23] The common-law claims advanced against American Appraisal are limited to those for fraud and "constructive" fraud, negligence and negligent misrepresentation.

claims, such as that for common-law fraud, predicated upon intentional conduct survive by virtue of the doctrine of equitable tolling as it exists in the District of Columbia.[24] Because no claim for negligence or negligent misrepresentation may be brought against American Appraisal, *see* discussion *infra*, the Court need not reach the issue of whether those claims are time barred.

Conclusion

The question then arises as to what claims, absent evidence of fraudulent concealment, are barred. For those claims founded upon breach of fiduciary duty, such as the claims advanced against American Appraisal, ERISA provides for a six-year limitations period, except that a three-year period applies when the plaintiff has actual notice. ERISA § 413, 29 U.S.C. § 1113. Accordingly, since plaintiffs were not on notice of any potential claim against American Appraisal, even though the latter was guilty of no fraudulent concealment, as to any years other than 1978 and 1980, no claim accruing prior to February 28, 1978 may be brought against that defendant under Section 502(a)(3) of ERISA.[25] Since the applicable limitations period for the securities law claims is two years,[26] no such

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[24] Consistent with the Court's discussion of the doctrine of fraudulent concealment as applied to the federal claims brought against American Appraisal, no claim for fraud may be brought against that defendant except as it relates to the 1978 and 1980 appraisals.

[25] As is obvious, because of ERISA's six-year limitations period, claims under section 502(a)(3) arising out of the 1978 and 1980 appraisals would not be time-barred even absent any fraudulent conduct with regard to those appraisals.

[26] *See supra* note 5. While the *National Student Marketing* court stressed that the two-year limitations period decided upon in *Forrestal Village, Inc. v. Graham*, 551 F.2d 411 (D.C.Cir.1977), should not be applied retroactively, it is unclear whether the court meant retroactively to claims arising, or to suits filed, prior to 1977. The Court's discussion of the *plaintiffs'* reliance upon a three-year limitations period indicates

claim may be brought against American Appraisal, except for those accruing in 1978 and 1980. Finally, with respect to the common-law counts, claims may be brought against American Appraisal for fraud, but only with respect to the 1978 and 1980 appraisals.

PART II

ARE DEFENDANTS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' SECURITIES LAW CLAIMS?

Since their initial February 1984 complaint, plaintiffs have charged U.S. News, the directors and American Appraisal with violations of Section 10(b) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. § 78j(b), and Rule 10b-5 of the Securities and Exchange Commission ("SEC"), 17 C.F.R. § 240.10b-5 ("Rule"). They maintain that U.S. News and its directors intentionally and fraudulently depressed the value of the magazine's stock and, through misstatements and omissions in communications with U.S. News employees, concealed material facts underlying that undervaluation. That course of conduct, argue plaintiffs, resulted in significant loss to their interests in both the Profit-Sharing and stock bonus plans. Further, American Appraisal, having allegedly assisted U.S. News in undervaluing the magazine's stock, is charged with aiding and abetting the other defendants in their commission of securities fraud.

In their motions for summary judgment, all defendants contend that plaintiffs' interests in the Profit-Sharing Plan were not "securities" within the meaning of the Act and the Rule. Even if those interests, along with the stock bonus interests, could be termed "securities," defendants

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that the Court probably had the latter meaning in mind. In any event, the question here is academic, given that the only class year that would be effected, 1981, involves a claim that both accrued and was filed after 1977.

maintain that there was no causal nexus between their conduct and plaintiffs' alleged injuries. Finally, American Appraisal insists that it cannot be held liable as an aider and abettor and that, consequently, the securities count must be dismissed as to it.

A.

CLAIMS AGAINST U.S. NEWS AND THE DIRECTOR-DEFENDANTS

1. Application of Securities Law to the Profit-Sharing Plan

Defendants assert, as a threshold matter, that plaintiffs' interests in the Profit-Sharing Plan were not "securities" within the meaning of the Act and the Rule. Section 3(a)(10) of the Act, 15 U.S.C. § 78c(a)(10), defines "security" to include "any . . . certificate of interest or participation in any profit-sharing agreement or . . . investment contract. . . ." While plaintiffs maintain that their former interests in the Plan were "interest[s] . . . in [a] profit-sharing agreement," and hence fall squarely within the definitional language of the Act, defendants counter that interests in the Plan can only be characterized as interests in an "investment contract." Even under the latter characterization, argue defendants, plaintiffs' Plan interests failed to qualify as "securities" under the test enunciated by the Supreme Court in *International Bhd. of Teamsters v. Daniel,* 439 U.S. 551, 99 S.Ct. 790, 58 L.Ed.2d 808 (1979).

In *Daniel,* the Supreme Court had occasion to examine the possible coverage under the securities laws of the type of employee profit-sharing plan at issue here. In analyzing the plan presented in *Daniel,* the Court began by noting that a "certificate of interest . . . in [a] profit-sharing

agreement" is essentially the equivalent of an "investment contract."[27] 439 U.S. at 558 n. 11, 99 S.Ct. at 796 n. 11. *See also Tanuggi v. Grolier, Inc.*, 471 F.Supp. 1209, 1213 n. 5 (S.D.N.Y.1979); SEC Release No. 33-6188, 45 Fed.Reg. 8960, 8963 (1980). And since such a plan is an "investment contract," interest in the plan will be deemed securities only if "the scheme involves an investment of money in a common enterprise with profits to come solely from the efforts of others." 439 U.S. at 558, 99 S.Ct. at 795 (applying the test of *Securities and Exchange Commission v. W.J. Howey Co.*, 328 U.S. 293, 301, 66 S.Ct. 1100, 1104, 90 L.Ed. 1244 (1946)).

In applying the *Howey* test to the plan at issue there, the Court in *Daniel* found that neither the "investment" nor "expectation of profits" prongs of that test were met. The U.S. News Plan fares no better. To be deemed an investor, one must "cho[ose] to give up a specific consideration in return for a separable financial interest with the characteristics of a security." 439 U.S. at 559, 99 S.Ct. at 795 (citations omitted). In holding that no such investment had been made in *Daniel*, the Court found that the employees there were "selling [their] labor primarily to obtain a livelihood, not making an investment." *Id.* at 560, 99 S.Ct. at 797. In other words, because the employees received, in return for their labor, an "indivisible compensation package," part of which included pension benefits, they could not be said to have made an investment, for neither did the compensation package as a whole ex-

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[27] Plaintiffs attempt to avoid the force of *Daniel*'s holding that a profit-sharing plan is an "investment contract," by asserting that, whereas the plan at issue in *Daniel* was a pension plan, the U.S. News plan is a "profit-sharing agreement." Not only is plaintiffs' argument tautological, but it is expressly at odds with their assertion elsewhere that the Plan is a "pension plan" within the meaning of ERISA § 3(2), 29 U.S.C. § 1002(2). Moreover there appears to be no basis in fact for accepting the distinction that plaintiffs try to make. Like the U.S. News plan, the *Daniel* plan was funded through employer contributions and vested fully only after a number of years.

hibit "the characteristics of a security," nor did the employees' individual decisions "to accept and retain covered employment" have any direct relationship "to perceived possibilities of a future pension." *Id.*

The analysis mandated by *Daniel* compels a similar finding here. The U.S. News employees simply did not "invest" in the Plan when they began service with the Company. Receipt of Plan benefits—as measured by the value of the Plan assets—was merely an incident of employment. Moreover, participants in the Plan could be said to have "chosen" Plan participation only to the extent that they could have forgone receipt of benefits entirely. Such a "choice" lacks the element of voluntariness characteristic of an investment decision. *See* SEC Release No. 33-6188, 45 Fed.Reg. at 8964 & n. 44.

Taking its cue from *Daniel*, the SEC has issued a number of interpretive pronouncements limiting the coverage under the securities laws of employee pension plans. First, no plan in which participation is not voluntary and to which employees do not contribute is covered under the securities laws. SEC Release No. 33-6188, 45 Fed.Reg. at 8961. "[T]he determination of whether a plan is a voluntary, contributory one rests solely on whether the participating employees can decide at some point whether or not to contribute their own funds to the plan." SEC Release No. 33-6281, 46 Fed.Reg. 8446, 8447 (1981). In no way can it be said that plaintiffs contributed to the Plan, much less that any contribution was voluntary.

Even if one were to conclude that plaintiffs somehow "invested" in the Plan, they did not do so with any expectation of profits "derived from the entrepreneurial or managerial efforts of others," as required by *Daniel*. 439 U.S. at 561, 99 S.Ct. at 797. The *Daniel* Court compared the amount of income derived from the investment of the plan assets with the amount represented by employer contributions. *Id.* at 562, 99 S.Ct. at 797. The latter amount

($153 million) was sufficiently larger than the former ($31 million) to support a finding that the success of the plan was largely due, not to the efforts of the plan managers, but to sources of income "over which the plan itself ha[d] no control. . . ." *Id.* Further, enjoyment of plan benefits was dependent upon an "employee's effort to meet the vesting requirements, rather than the fund's investment success." *Id.* To that extent, the participating employee could not be said to have been looking to the plan for a "return" on "some hypothetical investment." *Id.*

An application of the "expectation of profits" prong of the *Daniel* analysis also leads the Court to conclude that plaintiffs' Plan interests were not securities. The health of the Plan was in no wise due to the entrepreneurial skill of its managers. First, the Plan managers were not free to trade the U.S. News stock held by the Plan. Even if they were, any appreciation in the value of the stock would have been due, not to their efforts, but to the success of the Company as a whole. While the Plan did maintain a portfolio of investment securities, income from these—no matter how well managed—was not a great enough factor in the Plan's overall financial health to satisfy *Daniel.*[28] Finally, just as in *Daniel,* a vesting period prevented an employee from obtaining any immediate or direct return on his investment. *See O'Neill v. Marriott Corp.,* 538 F.Supp. 1026, 1031 (D.Md.1982).

To clear up any doubt that the securities laws were not meant to cover a pension or profit-sharing plan such as the one here, the *Daniel* ruling noted that, in enacting

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[28] From 1975 through 1980, the Plan income that was not dependent upon the efforts of the Plan managers totaled some $8.8 million. Exhibit H of the U.S. News and Individual Defendants, submitted with their reply brief. During that same period, income from the management of the Plan's investment securities amounted to a mere $.36 million, *id.,* evidencing a greater disparity between the types of income than that in *Daniel.*

ERISA, Congress was filling what it thought to be a regulatory void. 439 U.S. at 569-70, 99 S.Ct. at 801-02. If the securities laws had already extended their coverage to employee benefit plans, the enactment of large portions of ERISA would have been otiose.

2. Application of Securities Law to the Stock Bonus Plan

It is problematic whether the same analysis that compelled a finding that plaintiffs' interests in the Profit-Sharing Plan were not securities applies as well to their bonus stock holdings.

At least one post-*Daniel* decision casts doubt upon whether interests in any employee stock option plan may be considered securities. *Bauman v. Bish*, 571 F.Supp. 1054, 1064 (N.D.W.Va.1983). *Bauman* however, is not controlling, and this Court declines to follow its reasoning. In examining whether a securities claim could be pressed in connection with an Employee Stock Ownership Plan ("ESOP"), the *Bauman* court found that the plan was more "a method of deferring income" than an arrangement whereby employees invested in employer securities. *Id.* Moreover, because the plan was covered by ERISA, the court felt compelled by the *Daniel* decision to hold that the plan was consequently not covered by the securities laws. *Id.* at 1064-65. The U.S. News stock bonus plan, in contrast, is not an ERISA plan, so that extension to it of coverage under the securities laws would do violence to no Congressional purpose. And to the extent that the U.S. News plan is not designed as "a method of deferring income," it can be argued that the bonus stock was awarded upon "the giving up [of] some tangible and definable consideration," *id.*, within the meaning of the *Howey* test.

More importantly, the *Howey* test was designed to determine whether a particular financial arrangement is an "investment contract" within the meaning of Section

3(a)(10) of the Act, 15 U.S.C. § 78c(a)(10). *Daniel,* 439 U.S. At 558, 99 S.Ct. at 795. It is not argued that the stock bonus plan is an investment contract,[29] and hence invocation of the *Howey* test to preclude a securities claim with respect to that plan is inapposite. What a participant in the stock bonus plan had were voting trust certificates which were redeemable as stock at the termination of the participant's employment, should the magazine decline its option to repurchase the stock represented by the certificates. In that eventuality, the participant would hold a stock certificate, with which he could do as he wished. Looking then at the plain language of the statute,[30] *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 756, 95 S.Ct. 1917, 1935, 44 L.Ed.2d 539 (1975), *cited in Daniel,* 439 U.S. at 558, 99 S.Ct. at 795, it would appear that interests in the U.S. News stock bonus plan represent either "stock" or "voting-trust certificates" within the meaning of the securities laws.

3. Presence of an "Investment Decision" as to the Resale of Bonus Stock

Even if plaintiffs' bonus stock interests are securities, a claim under the Act or the Rule can only be maintained if some action or inaction on defendants' part influenced the resale of the stock. Simply stated, defendants contend that, because plaintiffs were required, upon retirement, to offer their holdings to the magazine, any wrongs that defendants may have committed were either not "material" to or not "in connection with" a sale or purchase of securities within the purview of the securities laws.

Defendants are correct, of course, in stressing that, to survive dismissal, plaintiffs must demonstrate a causal con-

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[29] Consequently, whether the stock bonus plan satisfies the other prongs of the *Howey* test as well is irrelevant.

[30] *See* Section 3(a)(10) of the Act, 15 U.S.C. § 78c(a)(10) (" 'security' means any . . . stock . . . [or] voting-trust certificate. . . .").

nection between their resale of bonus stock and defendants' allegedly deceptive practices. *Securities and Exchange Commission v. Savoy Industries, Inc.*, 587 F.2d 1149, 1171 (D.C.Cir.1978), *cert. denied sub nom. Zimmerman v. SEC*, 440 U.S. 913, 99 S.Ct. 1227, 59 L.Ed.2d 462 (1979); *Chemical Bank v. Arthur Andersen & Co.*, 726 F.2d 930, 943 & n. 23 (2d Cir.1984); *Securities and Exchange Commission v. Wall Street Pub. Instit., Inc.*, 591 F.Supp. 1070, 1088 (D.D.C.1984); *Coons v. Kidder, Peabody & Co., Inc.*, 539 F.Supp. 1145, 1147 (S.D.N.Y.1982). Defendants argue that such a link cannot be demonstrated where a plaintiff employee is required to offer his shares back to his employer, citing *Coons*, 539 F.Supp. at 1148; *Ryan v. J. Walter Thompson Co.*, 322 F.Supp. 307, 313 (S.D.N.Y.), *aff'd*, 453 F.2d 444 (2d Cir.1971) (per curiam), *cert. denied*, 406 U.S. 907, 92 S.Ct. 1611, 31 L.Ed.2d 817 (1972).

Plaintiffs reply that, even though the magazine had an option to buy back each employee's stock, each employee nevertheless made an "investment decision" in deciding when to retire. Accordingly, they place great reliance upon *Ayres v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 538 F.2d 532 (3d Cir.), *cert. denied*, 429 U.S. 1010, 97 S.Ct. 542, 50 L.Ed.2d 619 (1976).

In *Ayres*, the court held that, because he alleged that he would have postponed retirement had he known of certain facts, the plaintiff's case was distinguishable from that of *Ryan*. 538 F.2d at 537. In response, defendants argue that *Ayres* has been widely criticized and maintain that none of the *Foltz* plaintiffs has asserted that he would not have retired when he did had he known of the facts at the basis of the present suit. As to defendants' factual premise, the record is to the contrary. Some plaintiffs were asked, in the course of their respective depositions, only to state why they left the magazine, not whether they would have stayed on if they had known additional facts. Others were asked whether, knowing at the time of their retirement what they know now, they would have altered

their plans; at least some responses were in the affirmative.[31]

Defendants' legal premise, that *Ayres* is not good law, is equally dubious. Two cases cited by defendants as criticizing *Ayres* do so without analysis.[32] *Ayres* has, in fact, been cited with approval by a number of courts. *See, e.g., Trecker v. Scag,* 679 F.2d 703, 709 & n. 13 (7th Cir.1982) (plaintiffs, had they known of certain facts, could have sued for redemption of shares under buy-back provision); *Grigsby v. CMI Corp.,* 590 F.Supp. 826, 830-31 (N.D.Cal.1984). Moreover, as the dissent in *Ayres* notes, the defendant there had an unfettered option to repurchase plaintiff's stock for any reason upon 90-days' notice, not only upon plaintiff's retirement.[33] 538 F.2d at 540 (dis-

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[31] Plaintiff Williamson, when asked whether knowledge of an increase in the value of the U.S. News stock would have affected his retirement plans, stated that he would have "held on" had he known of such an increase. Williamson Deposition, April 24, 1984, at 5-6. Similarly, plaintiff Theobald decided to retire when he did at least in part because he thought his current holdings would provide him enough retirement income. Theobald Deposition at 9-10. Had he thought there was a possibility that his retirement interests had been undervalued, he would have considered postponing retirement. *Id.* at 59-60. Plaintiff Handleman stated that he was advised to retire before the next appraisal and to take what to his thinking was a good price. Handleman Deposition, April 25, 1984, at 7.

[32] The cases are *Coons,* 539 F.Supp. at 1148 n. 3 and *Villada v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 460 F.Supp. 1149, 1150 (S.D.N.Y.1978). The *Coons* court distinguished *Ayres,* however, by noting that the plaintiff in *Ayres* alleged that he would not have retired when he did had he known of certain facts.

[33] 539 F.Supp. at 1148.

At least one case cited by defendants as critical of *Ayres* noted that, if *Ayres* has limited precedential value, it is because the majority overlooked the fact that Merrill Lynch retained the 90-day repurchase option. *St. Louis Union Trust Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,* 562 F.2d 1040, 1053 n. 18 (8th Cir.1977), *cert. denied,* 432 U.S. 925, 98 S.Ct. 1490, 55 L.Ed.2d 519 (1978).

senting opinion). In the instant case, U.S. News had no greater option than that focused upon by the majority in *Ayres*—an option to repurchase an employee's stock upon his retirement. While the *Ayres* court may have erred in reaching the conclusion it did based upon the facts before it, which error has occasioned all the criticism, the principle for which *Ayres* stands is still perfectly good law.

Accordingly, this Court holds that a plaintiff, who asserts that he would have deferred retirement pending a hoped-for increase in the value of his stock holdings, makes out a claim under Section 10(b) of the 1934 Act.[34]

B.

CLAIMS AGAINST AMERICAN APPRAISAL

Plaintiffs charge American Appraisal with securities law violations by asserting that the company aided and abetted the primary violations committed by U.S. News.[35]

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[34] Plaintiffs also contend that their decision not to seek reappraisal of the U.S. News stock in any year was an investment decision. It is unnecessary to probe further the plausibility of this argument; however, the Court does note that nothing in the record indicates that plaintiffs made a conscious *decision* not to seek reappraisal and that, in advancing such a position, plaintiffs have altered their earlier stance that such a decision was precluded by defendants' actions. *See* Plaintiffs' Reply Memorandum in Support of Motion for Preliminary Injunction at 50.

Finally, plaintiffs contend that, since the securities laws apply equally to purchases or sales of stock, citing *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 475-76, 97 S.Ct. 1292, 1301-02, 51 L.Ed.2d 480 (1977), U.S. News made an investment decision when it decided (in all cases) to exercise its repurchase option. Defendants quite correctly point out that the issues of "materiality" and causation go to the question of whether the defendants' alleged wrongs induced action or inaction on the part of a purchaser- or seller-*plaintiff*. In short, plaintiffs "must demonstrate a causal connection between their sales and the alleged deceit." *Coons*, 539 F.Supp. At 1147. It makes no sense to speak of a causal connection between defendants' deceit and their own purchases. Moreover, when the *Santa Fe* Court indicated that the securities laws cover purchases as well as sales, it meant that a *plaintiff* could be either a purchaser or seller, not that a plaintiff could bring an action alleging that a defendant-purchaser had made an "investment decision" induced by its own deceptive practices. *See Santa Fe*, 430 U.S. at 474-77, 97 S.Ct. at 1301-03 (discussing how a defendant's manipulation or deception might affect the investment choices of a plaintiff).

[35] American Appraisal argues that plaintiffs have not articulated an

There are three elements essential to liability under this theory: (1) commission by another of a primary violation; (2) scienter, or a "general awareness" on the part of the accused "that his role was part of an overall activity that was improper"; and (3) knowing and substantial assistance in the commission of the primary violation. *Investors Research Corp. v. Securities and Exchange Commission*, 628 F.2d 168, 178 (D.C.Cir.), *cert. denied*, 449 U.S. 919, 101 S.Ct. 317, 66 L.Ed.2d 146 (1980). The first of these elements has already been considered; plaintiffs have successfully stated a claim against U.S. News for violation of Section 10(b) of the 1934 Act as to the stock bonus plan. Still remaining, then, are questions of scienter and substantial assistance.

The precise contours of plaintiffs' claims against American Appraisal are not as clear as they might be. The other defendants have been variously charged with misrepresenting or failing to disclose (1) the market value of the U.S. News real estate holdings; (2) the use of a minority-interest valuation and marketability discount; (3) the awards of phantom stock; and (4) the plaintiffs' right to seek reappraisal. Even with a generous view of the pleadings, it is hard to see how American Appraisal could have aided U.S. News and the director-defendants in such allegedly broad-based schemes to defraud plaintiffs.

In light of the Court's analysis of the statute of limitations issue, it should be clear that the last two charges of misrepresentation and nondisclosure had nothing to do with the work performed by American Appraisal and cannot form the predicate of an aiding and abetting charge. As to the first two, the Court has examined the appraisal

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aiding and abetting claim as to it and that the factual allegations supporting the charge have not met the requirements of Rule 9(b), Fed.R.Civ.P.

While the allegations in the Fourth Amended Complaint may have been questionable, any remaining doubts were cleared by ¶ 50 of the Fifth Amended Complaint.

reports prepared during the class period and has discovered, contrary to plaintiffs' assertions, that all the improprieties complained of by plaintiffs—if, indeed, any part of American Appraisal's methodology could be said to be improper—were adequately disclosed in the appraisal reports, with the exception of those involving the years 1973 and 1974, when detailed reports were not prepared. The degree to which the information contained in the appraisal reports was further disseminated to the U.S. News employees was simply not American Appraisal's responsibility. And as discussed *infra,* the possibly inadequately disclosure in some years of certain information does not, as a matter of law, amount to the type of fraudulent conduct proscribed by Section 10(b) and Rule 10b-5.

To the extent that it adequately disclosed the information surrounding the appraisal process and real estate valuation, American Appraisal is for the most part immunized from Rule 10b-5 liability. The lower court opinions in *Santa Fe Indus., Inc. v. Green,* 430 U.S. 462, 97 S.Ct. 1292, 51 L.Ed.2d 480 (1977),[36] opinions which were not disturbed on review by the Supreme Court, support this conclusion. Both the trial and appellate courts in *Santa Fe* found that the appraiser could not beheld liable under the Rule, since its role was limited to preparing an appraisal report and did not involve any participation in the underlying wrong.[37] 391 F.Supp. 849, 854 (S.D.N.Y.1975); 533 F.2d 1283, 1291-94 (2d Cir.1976). Whether American Appraisal is guilty of wrongdoing in connection with the preparation of any of its reports depends upon what level of scienter will support an aiding and abetting charge.

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[36] In *Santa Fe,* plaintiffs alleged that the price they received as shareholders of a 95% owned subsidiary, upon execution of a short-form merger, was fraudulently depressed.

[37] American Appraisal also notes that its reports were much more informative than those of the appraiser in *Santa Fe* and that, hence, it fully discharged its duties under the securities laws.

Where the party charged as an aider and abettor owes the plaintiff a fiduciary duty, the standard of scienter has been held to be one of "recklessness." *Frankel v. Wyllie & Thornhill, Inc.*, 537 F.Supp. 730, 743 (W.D.Va.1982) (citing *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 97 (5th Cir.1975); *Sundstrand Corp. v. Sun Chemical Corp.*, 553 F.2d 1033, 1044-45 (7th Cir.1977); *IIT v. Cornfeld*, 619 F.2d 909, 923 (2d Cir.1980)). Pointing to the Appraisers' Code of Ethics, plaintiffs urge the court to find that a general fiduciary duty is imposed on appraisers in the performance of their duties. In so doing, plaintiffs seem to be suggesting that the court ignore the prior case law cited *supra*, as well as applicable Department of Labor regulations defining a fiduciary under ERISA.[38] *See* 29 C.F.R. §§ 2509.75-5, 2510.3-21(c)(1)(ii) (1984).

Absent a fiduciary duty running from the party to be charged with aiding and abetting and the party so charging, the assistance rendered the primary violator must have been both "substantial" and "knowing." *Investors Research Corp.*, 628 F.2d at 178. *Accord Woodward*, 522 F.2d at 95; *Frankel*, 537 F.Supp. at 744. Undaunted, plaintiffs valiantly attempt to bootstrap into that standard a duty of care premised only upon negligence. Since American Appraisal "knew" that its reports were deficient, the argument runs, it "knowingly" aided and abetted the other defendants in perpetrating their allegedly fraudulent schemes. Regardless of the validity of the premise—that the reports were deficient and that American Appraisal knew as much—the syllogism constructed here by plaintiffs does not support the conclusion reached. "Knowing as-

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[38] To the extent that ERISA, and not the securities laws, affords employees superior protection, it seems that ERISA's definition of "fiduciary" should control, even if the securities laws do cover employee benefit plans. *See Daniel*, 439 U.S. at 569-70, 99 S.Ct. at 801-02 (arguing that certain provisions of ERISA make unnecessary the extension to employee benefit plans of the securities laws). *See* discussion of ERISA claims, *infra*.

sistance" means just that: that the party charged (1) has knowingly undertaken certain actions, (2) which it knows will provide (3) assistance to the party committing the primary violation. To hold otherwise would emasculate the standard, *see Investors Research Corp.*, 628 F.2d at 177, by confusing a general awareness of one's actions with purposive conduct. Even if American Appraisal prepared its reports negligently, it cannot be held to have participated in a *fraud* upon retiring employees of U.S. News.

Nevertheless, there are two instances in which American Appraisal might be said to have knowingly assisted in a violation of the securities laws. The Court has already observed that, with respect to the 1978 and 1980 year-end appraisals, there are present material issues of fact as to whether that defendant engaged in purposive conduct that would form the predicate of a cause of action sounding in fraud. And since fraudulent conduct forms the kernel of a Rule 10b-5 violation, it follows that plaintiffs should be able to assert at trial an aiding and abetting claim against American Appraisal in connection with reports prepared for those years.

Conclusion

For the foregoing reasons, plaintiffs will be able to assert a securities claim against U.S. News and the director-defendants insofar as it relates to undervaluation of plaintiffs' bonus stock holdings. In addition, an aiding and abetting claim properly lies against American Appraisal in connection with the stock bonus plan, but only as it arises out of the 1978 and 1980 year-end appraisals.[39]

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[39] In their Fifth Amended Complaint, plaintiffs include a general prayer for punitive damages. Their subsequent responses to interrogatories relative to that complaint reveal that they seek recovery of punitive damages on their securities claims, among others. The 1934 Act does not provide for treble or punitive damages, and expressly limits recovery to "actual damages." *Id.* § 28(a), 15 U.S.C. § 78bb(a).

PART III

ARE DEFENDANTS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' ERISA CLAIMS?

Plaintiffs have asserted claims arising under ERISA against the Profit-Sharing Plan, U.S. News, the director-defendants and American Appraisal. Their claim against the Plan is limited, as it must be, to recovery of benefits due.[40] Against the remaining defendants plaintiffs seek compensatory and punitive damages for what they charge were breaches of fiduciary duty, imposed by ERISA, in connection with the alleged undervaluation of the Company's stock.[41]

In voicing their opposition to plaintiffs' claims, defendants underscore two issues involving the application of ERISA to this litigation. The first presented is whether the stock bonus plan is a "pension plan" within the meaning of ERISA. The second requires a determination as to whether the Supreme Court's recent decision in *Massachusetts Mutual Life Ins. Co. v. Russell*, ___U.S. ___, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985), bars plaintiffs' claim for damages under Section 502(a)(3) of ERISA, 29 U.S.C. § 1132(a)(3), for defendants' alleged breaches of fiduciary duty.

In addition, American Appraisal contends that, even if *Russell* does not bar a suit against fiduciaries for damages under § 502(a)(3), it is not a fiduciary within the meaning of ERISA, nor can an action be maintained against it as a non-fiduciary.

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[40] The civil enforcement scheme of ERISA, § 502, 29 U.S.C. § 1132, expressly provides for the recovery of "benefits due . . . under the terms of [a] plan," *id.* at § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B), but provides for no other relief as against a plan.

[41] No claim arising under ERISA may be brought by class members who retired before January 1, 1975, the effective date of the Act. Those claims were dismissed by Order of August 23, 1985.

A.

COVERAGE UNDER ERISA OF THE STOCK BONUS PLAN

U.S. News, the director-defendants, and American Appraisal all argue that ERISA offers plaintiffs no relief for alleged wrongs committed in connection with the stock bonus plan, because the Act simply does not cover such plans. In particular, defendants note that the stock bonus plan does not fit within ERISA's definitional framework. The plan quite clearly is not an "employee welfare benefit plan," ERISA § 3(1), 29 U.S.C. § 1002(1), nor does it seem to be an "employee pension plan." Under ERISA, § 3(2), 29 U.S.C. § 1002(2), an "employee pension plan" is defined as one that

> (i) provides retirement income to employees, or (ii) results in deferral of income by employees extending to the termination of covered employment or beyond, regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

The applicable Department of Labor regulations offer further clarification:

> [T]he terms "employee pension benefit plan" and "pension plan" shall not include payments made by an employer to some or all of its employees as bonuses for work performed, *unless such payments are systematically deferred to the termination of covered employment or beyond, or so as to provide retirement income to employees.*

29 C.F.R. § 2510.3-2(c) (1984) (emphasis added).

In support of their argument that the stock bonus plan is covered by ERISA, plaintiffs assert that the U.S. News plan *does* defer the income to its employees and that such

deferral is effected by the requirement that the bonus stock be redeemed only upon retirement or separation.[42] In response, defendants argue first that, since the stock awards were made to employees at regular intervals and were based upon services rendered by the employees,[43] they were essentially current compensation and, hence, not the kind of deferred or retirement income contemplated by ERISA. In support of that proposition, defendants cite *Murphy v. Inexco Oil Co.*, 611 F.2d 570, 575 (5th Cir.1980), a case involving a plan in which employees received discretionary awards of royalties from the employer's oil and gas revenues. In holding that the royalties were not pension benefits, the *Inexco* court stressed that the payments were made annually to the employees as the company received revenues. 611 F.2d at 575. The difference between that plan and the U.S. News plan, of course, is that U.S. News paid its employees in *stock*, redeemable only upon separation. *But cf. Jervis v. Elerding*, 504 F.Supp. 606 (C.D.Cal.1980) (in-kind payments not covered by ERISA).

In arguing that the resale restrictions placed on the bonus stock are not sufficient to qualify the plan for ERISA coverage, defendants note that the stock awards were taxable to the employees upon receipt. Hence, they contend the awards could not have been a form of deferred compensation. Whether the tax treatment of the plan is

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[42] Plaintiffs rely upon two Department of Labor Advisory Opinions, both of which indicate that restrictions on the pre-termination resale of stock point towards treatment of stock bonuses as retirement or deferred income. DOL Adv.Op. 79-78A at 1 (Nov. 1, 1979); DOL Adv.Op. 84-46A at 3 (Nov. 19, 1984). Yet in both opinions, the Department merely indicated that resale restrictions are a necessary, but perhaps not sufficient, condition for ERISA coverage.

[43] Because the awards were based upon an employee's salary and length of service, the awards seem to be proportionate to services rendered. To that extent, and because they are made periodically, they take on the appearance of compensation rather than deferred or retirement income.

controlling is unclear, but defendants urge the court's reliance upon it in the absence of other controlling precedent.

Conclusion

From analysis of the authorities advanced by the parties and after consideration of the statutory definitions and regulations, the Court accepts defendants' position that the stock bonus plan is not covered by ERISA.

B.

AVAILABILITY OF SECTION 502(a)(3) AS A REMEDY

1. Liability of U.S. News and the Director-Defendants

While not relied upon in their initial and earlier complaints, Section 502(a)(3) of ERISA plays a dominant role in plaintiffs' Fifth Amended Complaint and in their summary judgment memoranda. Not deterred by the ruling in *Russell* that plan beneficiaries cannot recover "extracontractual" damages from fiduciaries under Section 409, 29 U.S.C. § 1109, plaintiffs seize upon the Court's failure to indicate whether the recovery of "extracontractual" damages was similarly barred under Section 502(a)(3). In this connection, the Court's opinion in *Russell* merits fuller discussion.

Essentially, the Court ruled in *Russell* that extracontractual recovery could not be secured because *any* recovery, at least under Section 409(a),[44] necessarily inured to the plan itself, and not to any beneficiaries of the plan. ___U.S. at ___-___, ___, 105 S.Ct. at 3089-90, 3092. In other words, because a *beneficiary* cannot recover damages for a fiduciary's derelictions under that section, a bene-

[44] Section 409(a) provides that a breaching fiduciary "shall be personally liable to make good to such plan any losses to the plan resulting from such breach, and to restore to such plan any profits [made by] such fiduciary. . . ."

ficiary's only remedy, at least in terms of monetary recovery, is provided by Section 502.[45] Moreover, the Court was unwilling to imply a remedy for injured beneficiaries apart from those specifically enumerated in Section 502. ___U.S. at ___-___, 105 S.Ct. at 3092-94. The Court's rationale for so holding hinges upon a concern for the integrity of ERISA as an "interlocking, interrelated, and interdependent remedial scheme." ___U.S. at ___, 105 S.Ct. at 3093. Yet in discussing the remedies available under Section 502, the Court never expressly refers to Section 502(a)(3). Admittedly, the Court indicated earlier that it was examining respondent's claims only in light of Section 409; however, it was not foreclosed from taking up the issue. Yet in stating that the six remedies enumerated in Section 502 provide the exclusive remedies available to redress wrongs proscribed by the statute, ___U.S. at ___, 105 S.Ct. at 3093, the Court is, by implication, including Section 502(a)(3) among those. The Court simply declined to express a view as to whether relief sought by the respondent might be available under that provision.[46]

Plaintiffs, taking their cue from Justice Brennan's concurrence, ___U.S. at ___-___, 105 S.Ct. at 3094-99, contend that the provision in Section 502(a)(3) affording "other equitable relief" embraces monetary recovery as well. It is Justice Brennan's position that the "equitable relief" language should be read expansively to incorporate tra-

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[45] The Court left open the question whether a *plan* might be able to recover "extracontractual compensatory or punitive damages." 105 S.Ct. at 3092 n. 12.

[46] Defendants argue that to hold that the Court—for whatever reason—ignored a portion of the statute that would have provided the relief sought would trivialize the opinion, reducing it to an admonition that litigants must plead the proper statutory provision. This is a serious charge. Yet because the Court expressly declined to reach the issue in question, it cannot be assumed that its reservation was tantamount to a holding that Section 502(a)(3) does not afford beneficiaries extracontractual relief.

ditional remedies available under trust law, remedies which, he asserts, include the recovery of money damages from a fiduciary.

Defendants reply that the "catchall" provision of Section 502(a)(3)[47] cannot afford plaintiffs relief that would be denied under Section 409(a). The defendants' reasoning is that the Court examined a similar catch-all provision in Section 409(a)[48] and found that relief was barred. But they seem to have ignored or have forgotten that the Court held that Section 409 relief necessarily inured to the plan precisely because the catchall language followed immediately upon language stating that recovery was to be had by the plan. Such limiting language is not present in Section 502(a)(3). Consequently, the Court's discussion of Section 409 by itself does not foreclose the possibility of recovery under Section 502(a)(3).

Defendants further contend that the Court's narrow reading of ERISA's remedial provisions is "explicitly at odds" with the concurrence's view, urged by plaintiffs. While it is true that the Court expressed concern lest attempts to "fine-tune" ERISA's enforcement scheme undermine that scheme, it did so in the context of deciding not to *imply* a cause of action for extra-contractual damages under the doctrine of *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 2087, 45 L.Ed.2d 26 (1975). Obviously, since Section 502(a)(3) is a part of that scheme, no effort at "fine-tuning" would be involved in holding that that section affords the plaintiffs the relief they seek.

By its very open-endedness, Section 502(a)(3) seems a likely mechanism by which a plan participant could recover

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[47] Section 502(a)(3) grants a plan participant the right "to obtain . . . appropriate equitable relief" to redress violations of the Statute or the plan or to enforce their terms.

[48] Section 409(a) subjects a breaching fiduciary "to such other equitable or remedial [measures] as the court may deem appropriate, including removal of such fiduciary."

damages from a breaching fiduciary. Damages in this context would embrace compensation due a participant for benefits wrongly denied. In other words, as under traditional principles of trust law, a participant could recover benefits that would have been paid him by the plan, but for the wrongful acts of the plan fiduciaries. The recovery, then, is measured by contract, rather than tort, principles. To this extent, it is even less likely that the *Russell* Court meant to deny recovery under Section 502(a)(3) of the kind of damages that plaintiffs *here* seek. Whereas the respondent in *Russell* sought *extracontractual*—tort—damages for the distress caused by petitioner's improper processing of her claim for benefits, plaintiffs in this proceeding seek only damages representing benefits due and unpaid.[49] In *Russell,* the Court held only that a plan participant could not bring a rather unorthodox tort claim against the trustee, not that ERISA swept away the *traditional* remedies afforded a beneficiary as against a trust fiduciary. *See* _____U.S. at ___ - ___ , 105 S.Ct. at 3095-97 (Brennan, J., concurring). *See also Central States Pension Fund v. Central Transport, Inc.,* 472 U.S. _____ , 105 S.Ct. 2833, 2840, 86 L.Ed.2d 447 (1985) (ERISA incorporates "the common law of trusts"); *Fink,* 772 F.2d at 958 (citing *Freund v. Marshall & Ilsley Bank,* 485 F.Supp. 629 (W.D.Wis.1979)); S.Rep. No. 127, 93d Cong., 2d Sess. 35 (1973), *reprinted in* 1974 U.S.Code Cong. & Ad.News 4639, 4838, 4865; H.R.Rep. No. 533, 93d Cong., 2d Sess. 17 (1973), *reprinted in* 1974 U.S.Code Cong. & Ad.News 4639, 4649 ("The fiduciary responsibility section [of ERISA], in

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[49] The *Russell* respondent was paid benefits owed her in full before she brought claim against the plan trustee. Her claim, then, sounded only in tort.

Similarly, the post-*Russell* cases brought to the Court's attention, *Powell v. C & P Tel. Co. of Virginia,* 780 F.2d 419 (4th Cir. Dec. 18, 1985), *Pokratz v. Jones Dairy Farm,* 771 F.2d 206 (7th Cir.1985) and *Light v. Blue Cross and Blue Shield of Alabama, Inc.,* 616 F.Supp. 558 (S.D. Miss.1985), involved tort claims and, hence, are inapposite.

essence, codifies and makes applicable to [ERISA] fiduciaries certain principles developed in the evolution of the law of trusts"); H.R.Rep. No. 1280, 93d Cong., 2d Sess. (1973), *reprinted in* 1974 U.S.Code Cong. & Ad.News 5038, 5076 (House Conference Report) ("The labor law provisions [of ERISA] apply rules and remedies similar to those under traditional trust law. . . .").

The remedies traditionally afforded beneficiaries by the common law of trusts include the recoupment from a breaching fiduciary of money damages, so that the beneficiary may be made whole. *Restatement (Second) of Trusts* §§ 199(c), 205 (1959); G. Bogert & G. Bogert, *The Law of Trusts and Trustees* § 862 (2d rev'd ed. 1982); III A. Scott, *The Law of Trusts* §§ 199.3, 205 (3d ed. 1967). *See also Brown v. Internat'l Union, United Auto., Aerospace and Agricultural Implement Workers of America (UAW)*, 512 F.Supp. 1337, 1363 (W.D.Mich.1981), *aff'd*, 689 F.2d 69 (6th Cir.1982). Defendants argue that such damages may be recovered only to the extent of a loss to the trust corpus owing to the fiduciaries' dereliction. Here, they assert, there has been no loss: if anything, any undervaluation of the magazine's stock has increased the cash holdings of the Plan by lessening the amount paid out each year in benefits. Yet the effect of an undervaluation would have been to deprive then-retiring Plan participants of a portion of the value due them from the Plan corpus, just as if the Plan fiduciaries had wrongfully sold off some of its assets. That there was no actual diminution in the Plan holdings is immaterial. III A. Scott, *supra*, § 205 at 1666.

Conclusion

Accordingly, the Court determines that, inasmuch as plaintiffs allege that fiduciary breaches by U.S. News and its directors deprived them of benefits owed under the Plan, they state a valid claim for damages under ERISA § 502(a)(3).

2. Liability of American Appraisal

American Appraisal adopts the position that, even if plaintiffs can maintain an action under ERISA § 502(a)(3), they cannot prevail against that defendant, since it is not a fiduciary within the meaning of ERISA. While the Court determines, for reasons to be discussed later, that an action may be maintained against American Appraisal, it is not because that defendant is a fiduciary under ERISA.

The ERISA provides that one is a fiduciary to the extent that it (1) "exercises any discretionary authority or control respecting management or disposition of [plan] assets"; (2) "renders investment advice for a fee or other compensation. . ."; or (3) "has any discretionary authority or discretionary responsibility in the administration of the plan." *Id.* § 3(21)(A), 29 U.S.C. § 1002(21)(A); *Thornton v. Evans*, 692 F.2d 1064, 1077 (7th Cir.1982).

Certainly, American Appraisal had no authority, discretionary or otherwise, to manage, administer, or to deal with the Plan assets. Nor did its valuation of the U.S. News stock constitute "investment advice,"[50] as the Department of Labor's interpretive materials make clear. *See* 29 C.F.R. § 2510.3-21(c)(1)(ii) (1984) ("investment advice" refers to matters such as "investment policy or strategy"); DOL Adv.Op. 76-65 (June 7, 1976) (consultant who values employer securities not a fiduciary). Generally, it has been deemed consonant with ERISA's purpose that "attorneys, accountants, actuaries and consultants performing their

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[50] American Appraisal contends that its services cannot be deemed "investment advice," because such advice must be rendered to a plan before one may be considered a fiduciary, 29 C.F.R. § 2510.3-21(c)(1)(i) (1984), and American Appraisal never performed services for the Plan. While plaintiffs conceded in oral argument that American Appraisal did not undertake its duties for the Plan, to the extent that the Plan Committee was a subset of the Board of Directors, it seems rather formalistic to maintain that its services were rendered only to U.S. News and not to its profit-sharing plan.

usual professional functions . . . [are not to] be considered fiduciaries." 29 C.F.R. § 2509.75-5 (1984). Those services performed by American Appraisal were certainly no different.

Yet, that American Appraisal did not stand in a fiduciary relation to the Plan beneficiaries does not necessarily entail a conclusion that it may not be charged with participation in a breach of fiduciary duty committed by U.S. News and the director-defendants. Traditional principles of trust law, as incorporated by ERISA § 502(a)(3), provide not only for recovery against errant fiduciaries, but also from "non-fiduciaries who knowingly participate, either directly or through an agent, in a breach of trust." *Freund*, 485 F.Supp. At 641-42. American Appraisal asserts, however, that participation is insufficient to assess liability; rather, some wrongful gain must have been secured by the participating non-fiduciary. Since there is not the slightest showing that it acquired any gain, argues American Appraisal, it may not be charged with whatever fiduciary breaches the other defendants may have committed. Yet the receipt of some benefit or advantage from participation in a breach of trust is not a *sine qua non* of non-fiduciary liability. To be sure, some courts have held that participating non-fiduciaries are liable for their actions "at least to the extent [they] profit[] from the breach." *McDougall v. Donovan*, 539 F.Supp. 596, 598 (N.D.Ill. 1982); *Donovan v. Daugherty*, 550 F.Supp. 390, 410-11 (S.D.Ala.1982). Because personal gain is most often a concomitant of participation in a breach, most cases dealing with the issue of non-fiduciary liability involve situations in which the non-fiduciary defendant has, in fact, profited. Nevertheless, it is clear from those cases in which the non-fiduciary did not benefit, as well as from the way in which courts have generally stated the rule, that *participation*—not profit—is the predicate for liability. *See, e.g., Thornton*, 692 F.2d at 1078; *Wisconsin Real Estate Inv. Trust v. Weinstein*, 509 F.Supp. 1289, 1300 (E.D.

Wis.1981); *Belcher v. Birmingham Trust Nat'l Bank*, 348 F.Supp. 61, 78 (N.D.Ala. 1968); *LaHue v. Keystone Investment Co.*, 6 Wash.App. 765, 496 P.2d 343, 353 (Wash. Ct.App.1972); *Proctor v. Norris*, 285 Mass. 161, 188 N.E., 625, 626 (Mass.1934). *See also Restatement (Second) of Trusts* § 326 (1959); IV A. Scott, *The Law of Trusts* § 326.5 at 2570-71 (3d ed. 1967); G. Bogert & G. Bogert, *supra*, § 901 at 260. Moreover, the degree of participation required for a finding of liability need not reach the level of purposive conduct necessary to state a claim for assisting in the perpetration of a fraud. *See, e.g., Wisconsin Real Estate Inv. Trust*, 509 F.Supp. at 1299; *Proctor*, 285 Mass. 161, 188 N.E. at 626-27; IV A. Scott, *supra*, § 326.5 at 2570-71.

Conclusion

American Appraisal's alleged conduct thus falls within the boundaries of traditional trust law liability. Accordingly, plaintiffs may advance against American Appraisal claims for damages under ERISA § 502(a)(3) for those class years not outside the limitations period.

3. Recovery of Punitive Damages

Plaintiffs' general prayer for punitive damages is intended to apply to their claims arising under ERISA.[51] ERISA does not expressly exclude recovery of punitive damages, nor does it expressly provide by its terms for such recovery. The question then becomes whether, inasmuch as ERISA incorporates principles known to the common law of trusts, that incorporation embraces recovery of punitive damages.[52] The Statute's legislative history does

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[51] The plaintiffs indicated in their discovery responses that they sought punitive damages on the securities, ERISA, and common-law claims. *See supra* note 39.

[52] Under traditional principles of trust law, in certain instances a beneficiary may be able to recover punitive damages. G. Bogert & G. Bogert, *supra*, § 862 at 41.

not indicate which principles of trust law ERISA was meant to embrace. In the absence of more guidance, it would seem that ERISA incorporates those doctrines of the common law of trusts that are not at odds with the Act's general enforcement scheme.[53]

It is precisely because an award of punitive damages appears to be foreclosed by ERISA's enforcement provisions that the Court deems it the better course to strike the prayer for such relief. The language of Section 502(a)(3) provides for relief to "redress" violations of the Statute. *Id.* § 502(a)(3)(B)(i), 29 U.S.C. § 1132(a)(3)(B)(i). To "redress" a wrong is to make whole and to compensate the victim of that wrong. Punitive damages, on the other hand, are designed to punish and to deter wrongdoing. *International Bhd. of Elec. Workers v. Foust,* 442 U.S. 42, 48, 99 S.Ct. 2121, 2125, 60 L.Ed.2d 698 (1979). To award punitive damage, then, would go well beyond the scope of ERISA, which, to the extent that it borrows traditional trust law remedies, does so only to *compensate* victims of proscribed activity.[54]

Conclusion

Accordingly, plaintiffs' prayer for punitive damages on their ERISA claims must be stricken.

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[53] The recovery of punitive damages, however, is almost never *implied. See Dependahl v. Falstaff Brewing Co.,* 653 F.2d 1208, 1216 (8th Cir.), *cert. denied,* 454 U.S. 968, 102 S.Ct. 512, 70 L.Ed.2d 384 (1981).

[54] What *deterence* Congress believed was required is provided in ERISA's criminal enforcement provisions, § 501, 29 U.S.C. § 1131 (criminal penalties imposed for violations of Part 1 of Subtitle B, §§ 101-110, 29 U.S.C. § 1021-1030).

PART IV

ARE PLAINTIFFS ENTITLED TO PARTIAL SUMMARY JUDGMENT ON THEIR ERISA CLAIMS?

As previously noted herein, plaintiffs rely upon ERISA to recover benefits due from both the Profit-Sharing Plan and the stock bonus plan under Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). They also seek damages from U.S. News, the director-defendants and American Appraisal charging breaches of fiduciary duties under ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3).

Two of these issues have already been resolved against the plaintiffs. It has been determined that the stock bonus plan is not included within ERISA coverage, *supra* at 44-46. It has also been determined that while American Appraisal may be found liable under § 502(a)(3) as a non-fiduciary, *supra* at 53-55, that defendant is certainly not a fiduciary within the meaning of the Act.

In their pending motion for partial summary judgment, plaintiffs present two issues. The first concerns whether plaintiffs received less than the true value of their interests in the Profit-Sharing Plan. In this regard, plaintiffs claim that the U.S. News stock held by the Plan was grossly undervalued through the use of four challenged valuation methodologies: (1) the use of a minority-interest valuation; (2) the application of a marketability discount; (3) an improper reliance upon comparisons with "similar" companies to determine the value of the U.S. News stock; and (4) flawed and superficial consideration of U.S News' real estate holdings. The second issue concerns plaintiffs' allegation that U.S. News, the director-defendants and American Appraisal breached fiduciary duties imposed by ERISA in conducting and approving the challenged appraisals.

Applicable Standard of Review

It is primarily the deferential standard of review afforded by ERISA to the decisions of plan trustees that

makes it impossible to grant plaintiffs' motion in any part. The standard that seems most appropriate to apply to decisions involving the calculation of benefits would leave untouched any such decision that is not arbitrary or capricious. *See District 17, Dist. 29, Local Union 7113 v. Allied Corp.*, 765 F.2d 412, 416-17 (4th Cir.1985); *Short v. United Mine Workers of America 1950 Pension Trust*, 728 F.2d 528, 533 (D.C.Cir.1984).[55] Yet the review of a benefits determination may require application of a "stern hand and flinty eye," *Maggard v. O'Connell*, 671 F.2d 568, 572 (D.C.Cir.1982), where circumstances indicate that the individuals who made the determination are under a duty "to preserve the corpus of [a] trust and, accordingly, are naturally disinclined to make awards from it." *Id.* at 571. *See also Smith v. United Mine Workers of America 1950 Pension Trust*, 576 F.Supp. 1419, 1420-21 (D.D.C.1983). And while plan fiduciaries are held to a "prudent man" standard with regard to their management of the plan and its assets, ERISA § 404(a), 29 U.S.C. § 1104(a); *Fink*, 772 F.2d at 955; *Donovan v. Cunningham*, 716 F.2d 1455, 1463-64 (5th Cir.1983), *cert. denied*, ___U.S. ___, 104 S.Ct. 3533, 82 L.Ed.2d 839 (1984), even that more stringent standard leaves a fiduciary sufficient discretion to render inadvisable reversal of his decision upon summary judgment.

Not only are the factual questions raised by a plan fiduciary's decision not amenable to summary adjudication, but the absence of clear-cut legal standards governing the

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[55] These cases, and those cited by defendants, concern the determination of pension eligibility, not the calculation of pension benefits. Nevertheless, it would seem that if a given standard of review applies to a denial of benefits, one no stricter should apply to the mere computation of benefits that will, in fact, be awarded. *See Foltz*, 613 F.Supp. at 639 (post-remand opinion). Moreover, at least one court has applied the arbitrary and capricious standard to the calculation of benefits. *See Korn v. Levine Bros. Iron Works Corp.*, 574 F.Supp. 836, 840-41 (S.D.N.Y. 1983).

determination of benefits due leaves the Court without a yardstick by which to gauge the propriety of that determination. What formula should define the level of benefits to be paid is a question left "to the private parties creating the plan." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511, 101 S.Ct. 1895, 1900, 68 L.Ed.2d 402 (1981). The U.S. News Plan is, in this way, typical: the parties have indeed set out the relevant formula. Article Fifth ¶ e of the U.S. News Articles of Incorporation provides that, if a price per share of the magazine's stock cannot be agreed upon, it must be determined by appraisal. PX 2 at 9. And "[i]n making such appraisal the appraiser shall use methods and standards recognized by the regulations of the United States Internal Revenue Service as appropriate for determining the fair market value of corporate stock."[56] *Id.* at 9-10. Yet these very regulations are markedly open-ended in their requirements—or, rather, suggestions—as to the proper way in which to value the stock of a closely-held corporation such as U.S. News.[57] So, bearing in mind that the "[a]ppraisal of closely-held stock is a very inexact science . . .," *Cunningham*, 716 F.2d at 1473, a consideration of the contentions upon which plaintiffs found their present motion is appropriate.

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[56] Those regulations, in turn, provide that a qualified plan will lose its preferred tax status if benefits are distributed otherwise than in accordance with the terms of the plan. *See* Treas. Reg. § 1.401-1(a)(3)(iii), 26 C.F.R. § 1.401-1(a)(3)(iii) (1985).

[57] The applicable regulations provide only that a plan must "provide *a* definite predetermined formula for . . . distributing the fund accumulated under the plan. . . ." Treas.Reg. § 1.401-1(b)(1)(ii), 26 C.F.R. § 1.401-1(b)(1)(ii) (1985) (emphasis added). *See also* Rev.Rul. 80-155, 1980-1 C.B. 84, 85; Rev.Rul. 59-60, 1959-1 C.B. 237, 238.

A.

VALUATION METHODOLOGY

1. Use of a Minority Interest Valuation

The Treasury Department regulations governing appraisals of the U.S. News stock provide that any formula used to determine plan benefits must be nondiscriminatory, Treas.Reg. § 1.401-1(b)(1)(ii), 29 C.F.R. § 1.401-1(b)(1)(ii) (1985). The regulations also provide that any method used to value plan assets must be "consistently followed and uniformly applied." Rev.Rul. 80-155, 1980-1 C.B. 84, 85. Plaintiffs argue that the valuation of U.S. New's stock on a minority basis was not "consistent and uniform" because employees holding Plan accounts at the time of the magazine's sale in 1984 benefited from the liquidation of a controlling block of stock, whereas those employees who terminated their accounts prior to the sale realized only a minority interest. Yet, as a means of determining value, the minority-basis valuation was applied consistently during those years in which it was used. Its utility, if any, was ended, when the magazine was sold.

Leaving aside any question of discrimination, the propriety of using a minority-basis valuation cannot be resolved through a motion for summary judgment.[58] The Internal Revenue Service ("IRS") has noted that, while the control represented by a majority share of stock may

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[58] In their second motion for summary judgment, U.S. News and the director-defendants ask the Court to enter summary judgment in their favor with respect to the use of a minority-interest valuation. Because the practice of the appraisal industry is mixed, the argument runs, these defendants could not possibly have acted arbitrarily or capriciously in accepting American Appraisal's minority-basis valuation. Yet summary judgment in favor of defendants would be appropriate only if *all* factors in the record pointed to the reasonableness of accepting that valuation. It is simply impossible at this time for the Court to reach such a conclusion. Accordingly, defendants' motion in this regard is denied.

justify a higher valuation, such a determination should be based "upon a consideration of all the evidence affecting the fair market value [of the stock]." Rev.Rul. 59-60, 1959-1 C.B. at 242. Plaintiffs rely upon *Estate of Curry v. United States*, 706 F.2d 1424 (7th Cir.1983), for the proposition that a controlling block of stock must always be valued so as to reflect the premium reflected by that control. To be sure, in that case the court did find[59] that a control-basis valuation was appropriate. However, in so holding, the court eliminated the possibility that the majority share held by the decedent's estate would be sold off piecemeal rather than in a single block. *Id.* at 1427-29. Yet the Plan did liquidate minority interests in its assets parcel-by-parcel and, as defendants argue, was designed to do just that. In other words, the Plan could not have been a willing seller of its controlling block of U.S. News stock, because such a sale would have defeated the goal of employee ownership expressed in the magazine's Articles.[60] Even so, as plaintiffs note in their Reply Mem-

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[59] It is instructive that the issues raised in *Curry* arose during the course of a jury trial, in which the district court refused to instruct the jury that the decedent's interest in a block of non-voting stock should be valued equally with his interest in a controlling share of voting stock. That decision was reversed on appeal.

[60] Article Fifth provides:

> In order that the employees of the corporation may be encouraged to maintain the standards of excellence and initiative which the corporate business requires, and in order to maintain stability and continuity in management and other personnel of the corporation, it is intended that the beneficial ownership of the stock of the corporation shall, to the maximum extent practicable, be held by employees of the corporation or members of their families, directly or through the corporation's profit-sharing trust. . . .

PX 2 at 7. Plaintiffs contend in their Reply Memorandum that an intention to sell or not sell has no bearing on the valuation of a block of stock. The Department of Labor, to which has been delegated the authority to promulgate regulations under ERISA, has taken the con-

orandum, a valuation each year was to be undertaken of the *Plan's* assets, and the value of those assets is arguably not equivalent to the aggregate value of the divisible profit-sharing interests held by each employee. The proof of that contention, however, must await trial and the testimony of witnesses versed in valuation practices.

Plaintiffs in a related case involving U.S. News employees and arising out of much the same series of transactions, *Richardson, et al. v. U.S. News & World Report, Inc., et al., 623 F.Supp. 350 (1985)*, have argued in an "amicus" brief that, contrary to received wisdom, ERISA not only controls the calculation of plan benefits, but also mandates that a control block of stock, held by a plan, must be valued at a premium. The theory advanced in their brief was also adopted without elaboration in the *Foltz* plaintiffs' Reply Memorandum. The *Richardson* plaintiffs arrive at this position after a cursory look at several of the reporting provisions of the Act. After their review they contend that valuation of the assets held by the U.S. News Plan can only be viewed as a block, the sale of which would bring a premium. The argument and analysis presented is interesting. At this time, however, the Court is not convinced of the merit of their position.[61]

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trary position. *See* DOL Adv.Op. 77-78A at 35-36 (Oct. 3, 1977). Even the *Curry* court went on to hold, in connection with another challenged jury instruction, that "[i]t would simply have been legal error to forbid the jury from concluding that the company's full liquidation value may not be realizable due to legal constraints on the power to liquidate." 706 F.2d at 1430-31.

[61] The very portion of ERISA relied upon by the *Richardson* plaintiffs makes it clear that the "fair value" of a plan's assets is to be determined "pursuant to the terms of the plan. . . ." *Id.* § 3(26), 29 U.S.C. § 1002(26). And as discussed earlier, the terms of the U.S. News Plan, to the extent that they curb the discretion of an appraiser at all, would seem to favor a minority valuation, or at least a valuation that recognizes the need of the Plan to continue as a viable entity.

2. Use of a Marketability Discount

Plaintiffs question the propriety of discounting the value of the company's stock to reflect the absence of a ready market for that stock. Such a discount was inappropriate, plaintiffs maintain, insofar as the company, by repurchasing each year the bonus stock held by its employees, provided a ready market. Regardless of the merits of this contention, as to the stock bonus plan such an issue cannot be resolved by an appeal to ERISA's mandates, for it has been determined that that plan is not covered by ERISA. The Court notes in passing, however, that U.S. News' practice of repurchasing the bonus shares was taken into account in arriving at the relatively small discount that was applied. *See, e.g.,* PX 17 at 12. As for the propriety of discounting the Plan shares, which were required to be valued equally with the common stock, PX 2 at 7; PX 6 at 13, it should be pointed out that the essential purpose in discounting the magazine's stock as a whole was to render more accurate comparison with the actively-traded stock of similar companies. *See, e.g.,* PX 17 at 11-12. Whether, in the final analysis, this was a wise practice cannot be determined merely from perusing the record.

3. Use of Certain Market Comparatives

Plaintiffs challenge the methodology by which the stock of U.S. News was compared to that of similar companies to arrive at an estimate of the former's value. They contend that it was wrong as a matter of law to compare the Company's stock with that of companies whose stock was actively traded on an open market.[62] To the extent that the issue is governed by legal authority at all, plaintiffs' argument is tenuous. The IRS has indicated that,

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[62] Plaintiffs argue that such a comparison would necessarily lead to a minority-interest valuation. Yet as noted, whether such a valuation was appropriate is a factual issue that appears at this point to demand resolution at trial.

when the stock of comparative companies are used in valuing the stock of a particular closely-held corporation, those companies must be ones having their stock actively traded. Rev. Rul. 59-60, 1959-1 C.B. at 239, 242.

Plaintiffs further take issue with the choice of the particular comparatives used. It goes without saying that such a question is highly inappropriate for summary adjudication.

4. Valuation of the U.S. News Real Estate Holdings

Plaintiffs allege that the real estate held by U.S. News was consistently misappraised, in that it was either undervalued or not valued at all. In addition, for those years in which the magazine's excess real estate was valued separately, the amount arrived at was discounted to reflect the impossibility that such value could ever be realized absent majority control.[63]

The charge that the real estate was undervalued is founded largely upon two bases. First, plaintiffs allege that American Appraisal was not kept apprised of the unfolding plans to develop the Company's holdings. Second, what American Appraisal did know about the potential value of the real estate was not properly reflected in its appraisals. Neither of these issues is readily resolved by summary adjudication. The first involves what are clearly disputed issues of fact, as pointed out in the discussion of the limitations issue, *supra*. The second turns upon what is the proper accounting treatment for as yet unrealized value, a question that must be resolved at trial with the aid of expert testimony.

Similarly, whether it was appropriate to discount any valuation of the real estate to reflect the absence of control is by nature a factual question. It should be noted, how-

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[63] The appraisals are those for the year 1976 (PX 15), 1977 (PX 16), 1979 (PX 19), and 1980 (PX 20).

ever, that it is a somewhat different question from that of whether the Profit-Sharing Plan's stock holdings should have been discounted. The company's real estate, it might be argued, could have been sold off separately at any time, at least to the extent that it was excess to the publication business. The inquiry then becomes whether the Plan, which could have exercised the power to effect this sale, held an asset that ought to have been valued at the premium that could have thus been realized.[64] And that inquiry cannot be undertaken on a motion for summary judgment.

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[64] Defendants, as one might expect, answer this question in the negative, citing *Cunningham*, 716 F.2d at 1473 n. 38, for the proposition that, contrary to plaintiffs' assertions, a fiduciary who owns a controlling block of stock need not deal with that stock solely in the beneficiaries' interest. What defendants are saying, in essence, is that, even though the Plan could have voted to sell off the excess real estate, it was not obligated to its beneficiaries to exercise that power so as to give them the "benefit of effective control ownership by operation of law." 716 F.2d at 1473 n. 38.

At least two flaws in defendants' argument present themselves. First, it speaks only to whether the Plan participants' interests in the real estate—and not the real estate as a Plan *asset*—were properly valued. Second, the citation to *Cunningham* is inapposite. That case dealt with a situation in which the sole share-holder of a corporation sold a *minority* interest to that corporation's Employee Stock Ownership Plan ("ESOP") at a premium. In finding improper the ascription to the minority interest of a premium because the seller, who retained control, was bound to use that control for the benefit of the ESOP participants, the court noted that because "ERISA contemplates that fiduciaries will sometimes occupy position giving rise to dual loyalties . . .," 716 F.2d at 1473 n. 38, the seller was under no obligation to deal with his remaining stock solely for the benefit of the minority stockholders, but could instead enjoy some independence in the use of his own stock. In the instant case, it makes no sense to speak of the Plan as enjoying the benefit of its own stock.

B.

CLAIMS FOR BREACH OF FIDUCIARY DUTY

Plaintiffs charge each group of defendants with having breached, in various ways, fiduciary duties owed participants of the Plan. While none of the claims are ripe for summary adjudication, the Court has examined and will discuss each.

1. Claims Against U.S. News

Plaintiffs allege that U.S. News breached fiduciary duties owed them by failing to scrutinize the reports submitted by American Appraisal. While "fiduciaries need not become experts in the valuation of closely-held stock . . .," *Cunningham,* 716 F.2d at 1474, they are held to a standard grounded in prudence.[65] Yet under the facts of the instant case, the contours of such a prudential standard are best delineated by the fact-finder at trial, not by the court on the basis of conflicting record evidence.

Plaintiffs further allege that U.S. News was remiss is not keeping American Appraisal informed of the magazine's plans for developing its real estate. As should be abundantly clear by now, that charge is replete with disputed issues of fact.

2. Claims Against American Appraisal

As discussed previously, American Appraisal is not a fiduciary within the meaning of ERISA. Nevertheless, it may be that American Appraisal is liable for having participated in a breach of trust by U.S. News or the director-

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[65] As noted by this Court on another occasion, "[t]he interlocking membership and close relationship between the Board of Directors and the Plan managers buttress[ ] the conclusion that the determination of benefits made by the Plan should be closely examined." 613 F.Supp. at 641 (post-remand opinion).

defendants.[66] Yet the extent of that participation, if any, must be determined at trial.[67]

3. Claims Against the Director-Defendants

Plaintiffs claim that, by awarding themselves[68] large blocks of phantom stock, the director-defendants are guilty of self-dealing and hence of having breached fiduciary duties[69] owed to the Plan participants. In what manner, exactly, plaintiffs were injured is not at all clear. If the phantom stock awards negatively affected the earnings capacity of the magazine's stock and, hence, depressed the level of benefits paid to plaintiffs, the question becomes whether the accounting treatment of such deferred compensation was reasonable, a question that cannot be resolved on the record. If plaintiffs mean to challenge the acceleration of the awards that took place in 1982,[70] they have no standing to assert a claim, as each of them left the magazine prior to that event. Similarly, plaintiffs have no standing to bring a claim asserting that, as holders of

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[66] *See supra* at 1167-1168.

[67] If the propriety of American Appraisal's valuation approach presents disputed issues of fact, then whether use of that approach constitutes participation—knowing or inadvertent—in a breach of trust certainly is not a question amenable to summary judgment.

[68] Defendants maintain that the record shows that only disinterested directors voted on each award. The Court need not pass on that contention at this point.

[69] Presumably, plaintiffs mean to call into play ERISA § 406(b)(1), 29 U.S.C. § 1106(b)(1) (prohibiting a fiduciary from dealing with plan assets "in his own interest"). Yet because the phantom stock awards represented liabilities to be paid by U.S. News itself, rather than by the Plan, it is questionable whether a claim of self-dealing with regard to the Plan assets under ERISA—as opposed to one with regard to the magazine's assets as a whole, brought under general corporation law—may be brought against the director-defendants.

[70] In February and March of that year, four of the director-defendants received accelerated awards of phantom stock, which eliminated their outstanding balances. PX 1.

phantom shares, the director-defendants received more than their due of the 1984 sale proceeds. Finally, if the charge is that the phantom stock awards diluted the value of the magazine's Class A and common stock, by increasing the number of shares over which the appraised value of the Company was divided, the charge is open to serious question. At no time did the shares of phantom stock appear in the denominator of that fraction.[71]

Conclusion

Because the record contains conflicting evidence as to each of the claims pressed by plaintiffs, and because there is no settled legal authority resolving any issue thus raised, plaintiffs are not entitled to summary judgment as to any claim arising under ERISA.

PART V

DOES ERISA PREEMPT PLAINTIFFS' COMMON-LAW CLAIMS?

A. As to U.S. News and the Director-Defendants

Section 514(a) of ERISA, 29 U.S.C. § 1144(a), provides that, subject to certain exceptions not relevant here, ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described under [the definitional section]."[72] That

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[71] *See* 14 at 15; PX 15 at 16; PX 16 at 19; PX 17 at 13; PX 19 at 17; PX 20 at 14. Rather, contained in the denominator were only the 50,000 shares of Class A stock and a varying number (always less than 20,000) of common stock.

[72] ERISA preempts both statutory and common law to the extent of any conflict. *Id.* § 514(c)(1), 29 U.S.C. § 1144(c)(1) ("The term 'State law' includes all laws, decisions, rules, regulations, or other State action having the effect of law. . . .").

preemptive language is to be given broad effect.[73] *Metropolitan Life Ins. Co. v. Massachusetts*, ___U.S. ___, 105 S.Ct. 2380, 2385, 85 L.Ed.2d 728 (1985); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 98, 103 S.Ct. 2890, 2900, 77 L.Ed.2d 490 (1983); *Russell v. Mass. Mut. Life Ins. Co.*, 722 F.2d 482, 487-88 (9th Cir.1983), *rev'd on other grounds*, ___U.S. ___, 105 S.Ct 3085, 87 L.Ed.2d 96 (1985). Yet by its own terms, ERISA preempts state laws only "insofar as they . . . *relate to any employee benefit plan.*" *Id.* § 514(a), 29 U.S.C. § 1144(a) (emphasis added). A law "relate[s] to" an employee benefit plan, and hence is subject to preemption, "if it has a connection with or reference to such a plan." *Shaw*, 463 U.S. at 96-97, 103 S.Ct. at 2899-2900.

The precise reach of ERISA's preemption provision depends upon how the phrase "relate to" is to be construed. In holding that ERISA superseded New York's Human Rights Law and Disability Benefits Law, the Supreme Court stressed in *Shaw* that

> Congress used the words "relate to" in § 514(a) in their broad sense. To interpret § 514(a) to preempt only state laws specifically designed to affect employee benefit plans would be to ignore the remainder

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[73] Upon introducing the Conference Report on the floor of the Senate, Sen. Harrison A. Williams, Jr., Chairman of the Senate Committee on Labor and Public Welfare, stated:

> It should be stressed that with the narrow exceptions specified in the bill, *the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent State and local regulation of employee benefit plans.* This principle is intended to apply in its broadest sense to all actions of State or local governments, or any instrumentality thereof, which have the force or effect of law.

120 Cong.Rec. 29928, 29933 (1974), *reprinted in* 1974 U.S.Code Cong. & Ad.News 5177, 5188-89 (emphasis added).

> of § 514. It would have been unnecessary to exempt generally applicable state criminal statutes from pre-emption in § 514(b), for example, if § 514(a) applied only to state laws dealing specifically with ERISA plans.
>
> Nor, given the legislative history, can § 514(a) be interpreted to pre-empt only state laws dealing with the subject matters covered by ERISA—reporting, disclosure, fiduciary responsibility, and the like.

463 U.S. at 98, 103 S.Ct. at 2900. *See also Alessi*, 451 U.S. at 521-26, 101 S.Ct. at 1905-08.

Nevertheless, what triggers preemption—and what preemption doctrine is designed generally to alleviate—is conflict between federal and local law. In the absence of such conflict, preemption simply does not occur. Even when a federal statute is said to "occupy the field," the field must be defined before one can know what is being occupied. It is clear, however, that most of plaintiffs' common-law claims do fall within the boundaries of that field. Because ERISA sets forth its own standards of conduct to which fiduciaries are held *id.* §§ 404, 405, 29 U.S.C. §§ 1104, 1105, the assertion of a common-law claim for breach of the fiduciary duties of care[74] or loyalty would be either unnecessary because wholly congruent with a claim under ERISA § 409, or inappropriate because in conflict with ERISA's fiduciary principles. *See, e.g., Hollenbeck v. Falstaff Brewing Corp.*, 605 F.Supp. 421, 422-29 (E.D.Mo.1984). For much the same reasons, ERISA has been held to preempt claims for common-law fraud, *District 65, UAW v. Harper & Row, Publishers, Inc.*, 576 F.Supp. 1468, 1487 (S.D.N.Y.1983); *Ogden v. Michigan Bell Telephone Co.*, 571 F.Supp. 520, 522-24 (E.D.Mich.1983); for unjust enrichment and conversion, *District 65*, 576

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[74] In other words, any claim sounding in negligence brought against a plan fiduciary.

F.Supp. at 1487; and for negligence[75] in plan administration, *Ziskind v. Retail Clerks Internat'l Ass'n*, 3 E.B.C. 1012, 1014-15 (E.D.Cal.1982). *See also Dependahl v. Falstaff Brewing Co.*, 653 F.2d 1208, 1214-16 (8th Cir.), *cert. denied*, 454 U.S. 968, 102 S.Ct. 512, 70 L.Ed.2d 384 (1981) (claim for tortious interference with contract barred). Accordingly, no common-law claim, insofar as it relates to the Plan,[76] may be brought against U.S. News or the director-defendants.[77]

B. As to American Appraisal

Because the fiduciary duties and standard of care established by ERISA do not by their terms apply to one, such as American Appraisal, who is not a fiduciary, it is somewhat harder to say that the statute would preempt a common-law claim for fraud or negligence brought against that defendant. Yet it would certainly yield an anomalous result to hold that a claim for common-law fraud

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[75] As discussed, *supra* note 16, plaintiffs' claim for "constructive" fraud, because it merely restates plaintiffs' claims for negligence, is similarly preempted.

[76] Except, of course, that those plaintiffs who terminated their employment prior to the effective date of ERISA, January 1, 1975, may pursue their common-law claims as to the Plan. As to their interests in the stock bonus plan, of course, plaintiffs' common-law claims are not preempted.

Plaintiffs maintain that, if ERISA does not provide a remedy for given wrong, such as for the negligence of an appraiser, it cannot preempt a remedy otherwise available under state law to redress that wrong. Yet if, as plaintiffs would have it, state law could provide whatever it felt as lacking in federal law, preemption doctrine would have no meaning, for whenever Congress declined to create a certain remedy, state law would step in to fill the gap, regardless of the damage done to the federal statutory scheme as a whole. *See Ovitz v. Jefferies & Co., Inc.*, 574 F.Supp. 488, 491 (N.D.Ill.1983) (ERISA, through preemption, may limit a plan beneficiary's remedies.)

[77] No common-law claims have been asserted against the Plan as a defendant. *See supra* note 40.

or negligence may be brought against a non-fiduciary, but not against a fiduciary, with the consequence that their respective conduct, though arising out of the same set of transactions, would be governed by different legal standards.[78] Such a situation would pose an obstacle to the accomplishment of Congress' objective of establishing uniform standards of care governing conduct affecting employee benefit plans. *See* ERISA § 2(b), 29 U.S.C. § 1001(b); *Chicago and North Western Trans. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 317, 101 S.Ct. 1124, 1130, 67 L.Ed.2d 258 (1981), *cited in Dependahl*, 653 F.2d at 1214-15. Especially because American Appraisal, while not a fiduciary, may be charged with liability under ERISA § 502(a)(3), it would be odd to hold that a similar state-law claim might also be brought against that defendant.[79]

Accordingly, as with those brought against U.S. News and the director-defendants, all common-law claims brought against American Appraisal are preempted by ERISA, insofar as they relate to the Plan and have accrued after January 1, 1975. Plaintiffs' claims with respect to the stock bonus plan and to Plan interests liquidated prior to January 1, 1975 are not preempted. However, as discussed *infra*, no claim for negligence or negligent misrepresentation may be maintained against American Appraisal as to either plan with respect to any class year. The remaining claims for fraud are barred by the Statute of

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[78] Even when adopting traditional trust law principles, it was envisioned that federal courts would apply federal common law. *See Russell*, ___U.S. ___ - ___, 105 S.Ct. at 3097-98 (Brennan, J., concurring) (citing remarks of Senator Javits upon presenting Conference Report, 120 Cong.Rec. 29942 (1974)).

[79] A closer question would have been whether ERISA would preempt a claim brought against American Appraisal for breach of its contract to supply U.S. News with accurate appraisals, a contract arguably made on behalf of plaintiffs as third-party beneficiaries. Since plaintiffs did not press such a claim, among all those they added to their complaint, the Court is not required to wrestle with the issue.

Limitations, except as to the 1978 and 1980 year-end appraisals. As a result, plaintiffs' common-law claims as to American Appraisal are reduced to claims for fraud relating to the stock bonus plan, but only as to the 1978 and 1980 appraisals.

PART VI

ARE DEFENDANTS ENTITLED TO SUMMARY JUDGMENT ON PLAINTIFFS' COMMON-LAW CLAIMS?

In their recent motions and supporting memoranda for summary judgment, U.S. News, the director-defendants and American Appraisal urge this Court to dismiss, on a variety of grounds, the several common-law claims asserted against them. The Court has already considered and ruled on several issues pertaining to plaintiffs' common-law claims.[80] The remaining issues to be taken up here are whether an unjust enrichment claim lies as to U.S. News and whether claims for negligence and fraud may be brought against American Appraisal. The Court must also consider whether plaintiffs' prayer for punitive damages on their fraud claims as to all defendants must be stricken.

A. As to U.S. News—Unjust Enrichment Claim

In requesting the Court to dismiss the unjust enrichment claim, U.S. News seems to assume that the claim is predicated on the 1984 sale of the magazine and, consequently, argues that it is nonsensical to assert that a company can be unjustly enriched by its own sale. If that were all the plaintiffs had in mind in formulating this claim, one would be inclined to agree with U.S. News. However, as the Court reads the Fifth Amended Complaint ¶¶ 100-102, plaintiffs allege that, by repurchasing the bonus stock at grossly depressed values, U.S. News has retained a cash

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[80] The limitations issue was discussed *supra* at 1153-1155, 24-24, the claim for constructive fraud, *supra* note 16; the preemptive effect of ERISA, *supra* at 1174-1176.

surplus that it would not otherwise have. Under that theory, the Court is simply unable to say, as a matter of law, that such a claim cannot lie.

B. As to American Appraisal—Negligence and Fraud Claims

American Appraisal contends that, since it owed plaintiffs no duty, it is not liable to them for negligence or negligent misrepresentation. In addition, that defendant, in its original motion for summary judgment, urged dismissal of the fraud claim as to it.

1. Negligence claim

A negligence claim, such as asserted here,[81] will not lie unless American Appraisal owed plaintiffs a duty at the time of the alleged wrong. In cases involving negligent misrepresentation or the breach of a professional standard of care, the duty has been most often found in the contractual relationship existing between the parties. Liability to third parties, even when injury was foreseeable, exists for the most part only when the third party stands in a relation to the defendant that at least borders on the contractual. How the plaintiffs here fit into that doctrinal framework merits fuller discussion.

It is a long-established principle, albeit one subject to constant erosion,[82] that liability for negligent misrepresentation will not lie "in an indeterminate amount for an indeterminate time to an indeterminate class." *Ultramares*

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[81] While plaintiffs charge American Appraisal both with negligence and negligent misrepresentation, the Court is able to discern a conceptual difference between the two claims. If American Appraisal was negligent in conducting its appraisals, that negligence could have injured plaintiffs only to the extent that misleading information was conveyed to U.S. News or its employees.

[82] As Judge Cardozo noted back in 1931, "[t]he assault upon the citadel of privity is proceeding in these days apace." *Ultramares Corp. v. Touche*, 255 N.Y. 170, 174 N.E. 441, 445 (1931).

Corp. v. Touche, 255 N.Y. 170, 174 N.E. 441, 444 (1931). *See also National Sav. Bank of the Dist. of Colum. v. Ward*, 100 U.S. (10 Otto) 195, 25 L.Ed. 621 (1880) (attorney not liable to third party for negligent title search). In *Ultramares*, Judge Cardozo held that an accountant could not be held liable to a lender for negligently certifying the balance sheet of a corporate borrower, even when the accountant knew that the balance sheet would be relied upon by lenders and others. In so holding, Judge Cardozo distinguished *Glanzer v. Shepard*, 233 N.Y. 236, 135 N.E. 275 (1922), in which he held that a weigher, whose services were ordered by a seller on behalf of a buyer, was liable to the buyer for negligently overstating the weight (and hence the price) of a shipment to be accepted by the buyer. Whereas in *Glanzer*, the services rendered on behalf of the buyer constituted the "end and aim of the transaction," *id.*, 233 N.Y. 236, 135 N.E. at 275, the services performed in *Ultramares* were not intended to benefit only "incidentally . . . the formal promisee." *Id.*, 255 N.Y. 170, 174 N.E. at 445-46.

The District of Columbia courts have by and large adopted the reasoning in *Ultramares* and its progeny. Accordingly, where there is no danger of indeterminate liability, and where a contractual arrangement for the benefit of the plaintiff was entered into by the defendant and a third party, a claim for negligence may be asserted against that defendant. *Needham v. Hamilton*, 459 A.2d 1060, 1063 (D.C.App.1983). *Needham* held that an attorney may be liable to the intended beneficiary of a will that he negligently drafted. In such a case, the liability, if any, naturally runs only to an identified individual or group of individuals, who are the intended and, for the most part, the only beneficiaries of the contractual relationship entered into by the attorney and his client.

Restated somewhat more expansively, the law of the District of Columbia is that a supplier of information may be liable to a third party when he provides information

directly to the third party or "indirectly for the benefit of a *specific* third party." *Security Nat'l Bank v. Lish*, 311 A.2d 833, 835 (D.C.App.1973) (citing *Glanzer*) (emphasis added). *See also Remeikis v. Boss & Phelps, Inc.*, 419 A.2d 986 (D.C.App.1980) (report prepared by termite inspector given by real estate agent to plaintiffs). Essentially, the District of Columbia has followed the Restatement of Torts in limiting liability to injury suffered by a "person or one of a limited group of persons for whose benefit and guidance [defendant] intends to supply the information or knows that the recipient intends to supply it."[83] *Restatement (Second) of Torts* § 552(2)(a) (1977).

In this case, of course, plaintiffs do not contend that American Appraisal provided them with information. The question is, then, whether they fall into the second category of persons by whom a cause of action may be maintained. It cannot be seriously argued that American Appraisal intended to benefit plaintiffs by supplying U.S. News with its appraisal reports. However, it may be true that American Appraisal provided U.S. News with the reports knowing that U.S. News intended to benefit plaintiffs. Yet the catch remains that the plaintiff class is not a limited group of people within the meaning of the Restatement. Rather, plaintiffs, as a group, much more closely resemble the class of lenders and investors who the *Ultramares* court held could not be the intended be-

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[83] As Prosser states it,

> [The] foreseeability of harm is not the test. The Plaintiff must have been a person for whose use the representation was intended, and it is not enough that the defendant ought reasonably to have foreseen reliance by someone such as the plaintiff. Also if the plaintiff is not an identifiable person for whose benefit the statement was intended, he must at least have been a member of some very small group of persons for whose guidance the representation was made.

Prosser and Keeton, *The Law of Torts* § 107 at 747 (5th ed. 1984).

neficiaries of an accountant's report. The extension of liability to the plaintiff class here would result in the imposition of the same kind of indeterminate liability to an unidentified class[84] from which Judge Cardozo shied away and which the District of Columbia courts are not yet willing to indulge.[85]

Accordingly, no claim for negligence may be asserted against American Appraisal.

2. Fraud claim

In both their Fourth and Fifth Amended Complaints, plaintiffs allege that the under-valuation of the U.S. News stock constituted fraud, an allegation that American Appraisal contends will not survive a motion for summary judgment.[86] American Appraisal is correct, except in connection with the appraisals for 1978 and 1980.

Under District of Columbia law, fraud entails, among other things, the making of "a *deliberate* misstatement of fact . . . with the *intent* to deceive another person." *Shear v. Nat'l Rifle Ass'n of America*, 606 F.2d 1251, 1259 (D.C.Cir.1979) (emphasis added) (citations omitted); *Dresser v. Sunderland Apts. Tenants Ass'n, Inc.*, 465 A.2d 835, 839 (D.C.App.1983). Upon reviewing the entire record developed in this case, the Court has, for the most part,

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[84] At the time each appraisal was prepared, the number and identities of the U.S. News employees who subsequently were to leave the magazine was indeterminable. Accordingly, American Appraisal's liability would also have been indeterminate.

[85] When a federal court applies state law, it must construe the law as the highest court of that state would. *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 822, 82 L.Ed. 1188 (1938); *Steorts v. American Airlines, Inc.*, 647 F.2d 194, 196-97 (D.C.Cir.1981); *Felch v. Air Florida, Inc.*, 562 F.Supp. 383, 385 (D.D.C.1983). Consequently, if the local law of negligent misrepresentation is to be expanded, it must be so expanded by the District of Columbia Court of Appeals.

[86] American Appraisal raised this issue in its initial motion for summary judgment, filed July 15, 1985.

been unable to uncover any material issues of fact that would indicate that American Appraisal *intended* to defraud plaintiffs. However, as noted *supra*, the 1978 and 1980 year-end appraisals stand out as being somewhat suspect.[87] With respect to those—and only those—appraisals, the Court concludes that plaintiffs should be afforded an opportunity to develop at trial a claim for fraud.

C. As to All Defendants—Punitive Damage Claim

Both U.S. News and American Appraisal contend that plaintiffs' prayer for punitive damages with respect to their common-law claims must be stricken. Those defendants contend that the record is devoid of any evidence of the kind of wrongdoing that merits the imposition of exemplary damages.

The taxing of punitive damages is generally frowned upon in the District of Columbia, except when the defendant's conduct is "willful and outrageous," amounts to "gross fraud," or is "aggravated by 'evil motive, active malice, deliberate violence or oppression.' " *Mariner Water Renaturalizer of Washington, Inc. v. Aqua Purification Systems, Inc.*, 665 F.2d 1066, 1071 (D.C.Cir.1981) (citations omitted); *Boynton v. Lopez*, 473 A.2d 375, 377 (D.C.App.1984). The Court recognizes, along with defendants, that such a burden is a heavy one. However, that burden is one that plaintiffs must carry at *trial*. There is no reason why the Court must now gauge the alleged outrageousness of defendants' conduct; defendants are free to seek a directed verdict on the issue of punitive damages at the appropriate time during the trial.[88]

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[87] The Court has discussed the allegation that American Appraisal's conduct amounted to fraud in connection with the limitations issue and securities claim. Consistent with those conclusions, the Court is constrained to hold that any fraudulent activity on American Appraisal's part was limited to those appraisals.

[88] With regard to the 1978 year-end appraisal (and presumably the

Conclusion

In view of the foregoing discussion, plaintiffs may assert a claim for unjust enrichment as to U.S. News, insofar as it relates to their interests in the stock bonus plan, or their interests in the Profit-Sharing Plan that were liquidated prior to January 1, 1975.

Against American Appraisal plaintiffs may assert their claims for fraud, but only as they relate to the 1978 and 1980 year-end appraisals.[89] No claim for negligence, however, may be brought against that defendant.

Finally, plaintiffs may continue to seek punitive damages with respect to all their common-law claims, subject of course to contrary disposition during the course of the trial.

An appropriate Order accompanies this Memorandum Opinion.

1980 appraisal, as well), American Appraisal contends that any wrongdoing was chargeable solely to individual employees of the company, none of whom have been named as defendants, and that consequently punitive damages may not be recovered from American Appraisal as a corporate entity.

Yet as American Appraisal notes, a corporation may be taxed with punitive damages where it has ratified an employee's wrongdoing. *Jordan v. Medley*, 711 F.2d 211, 216 (D.C.Cir.1983); *Hammerman v. Peacock*, 607 F.Supp. 911, 919 (D.D.C.1985); *Remeikis v. Boss & Phelps, Inc.*, 419 A.2d 986, 992 (D.C.App.1980); *Franklin Invest. Co., Inc. v. Smith*, 383 A.2d 355, 358-59 (D.C.App.1978); *Restatement (Second) of Torts* § 909(d) (1979); *Restatement (Second) of Agency* § 217C (1958). By submitting reports founded, at least in part, upon the questionable conduct of its employees—conduct of which it was aware—American Appraisal ratified that conduct. In this way, when the 1978 year-end report was submitted with its per share valuation of $105, after responsible officials at the company were aware that the $105 figure was not the result of a studied appraisal, Deposition of John G. Russell, August 20, 1984, at 152, American Appraisal gave its imprimatur to the process by which the final valuation was arrived at.

[89] Such claims may be pressed only in connection with the bonus stock.

ORDER

In accordance with the Memorandum Opinion issued this day, it is this 15th day of January, 1986,

ORDERED

1. That plaintiffs' motion for partial summary judgment on their claims arising under ERISA is denied;

2. That the motions of U.S. News, the Director-Defendants and the Profit-Sharing Plan for summary judgment with respect to the statutes of limitation are denied;

3. That the motion of American Appraisal Associates for summary judgment with respect to the statutes of limitation is granted as to plaintiffs' claims arising under ERISA, except that a six-year limitations period shall apply, and granted as to any other claims brought by plaintiffs, except those relating to the 1978 and 1980 year-end appraisals.

4. That, as specified below, defendants' motions for summary judgment as to issues other than the statutes of limitations, are granted in part and denied in part:

MOTIONS OF U.S. NEWS AND THE DIRECTOR-DEFENDANTS

(a) Defendants' motion for summary judgment as to plaintiffs' claims arising under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission are: (i) granted as to plaintiffs' interests in the Profit-Sharing Plan, (ii) denied as to plaintiffs' interests in the stock bonus plan, and (iii) granted as to plaintiffs' prayer for punitive damages;

(b) Defendants' motions for summary judgment as to plaintiffs' claims arising under Section 502(a)(3) of ERISA are: (i) granted as to plaintiffs' interests in the stock bonus plan, (ii) denied as to plaintiffs' interests in the Profit-

Sharing Plan, and (iii) granted as to plaintiffs' prayer for punitive damages;

(c) Defendants' motions for summary judgment are granted as to plaintiffs' claims arising under Section 502(a)(1)(B) of ERISA with respect to the stock bonus plan;

(d) Defendants' motions for summary judgment as to plaintiffs' claims for common-law fraud, constructive fraud, breach of fiduciary duty, unjust enrichment, and negligence are: (i) granted with respect to plaintiffs' claims for constructive fraud, (ii) granted with respect to plaintiffs' interests in the Profit-Sharing Plan that accrued after January 1, 1975, (iii) denied with respect to plaintiffs' interests in the Profit-Sharing Plan that accrued prior to January 1, 1975 and with respect to plaintiffs' interests in the stock bonus plan, (iv) denied with respect to plaintiffs' claims for unjust enrichment, and (v) denied with respect to plaintiffs' prayer for punitive damages.

MOTION OF AMERICAN APPRAISAL ASSOCIATES

(a) Defendant's motion for summary judgment as to plaintiffs' claims arising under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission is: (i) granted as to plaintiffs' interest in the Profit-Sharing Plan and as to the stock bonus plan except with respect to the 1978 and 1980 year-end appraisals, and (ii) granted as to plaintiffs' prayer for punitive damages;

(b) Defendant's motion for summary judgment as to plaintiffs' claims arising under Section 502(a)(3) of ERISA is: (i) granted as to plaintiffs' interests in the stock bonus plan, (ii) denied as to plaintiffs' interests in the Profit-Sharing Plan, and (iii) granted as to plaintiffs' prayer for punitive damages;

(c) Defendant's motion for summary judgment as to plaintiffs' claims for common-law fraud, constructive fraud,

negligence and negligent misrepresentation is: (1) granted as to plaintiffs' claims with respect to their interests in the Profit-Sharing Plan that are not barred by the statute of limitations, (ii) granted as to plaintiffs' interests in the stock bonus plan, except as to claims for common-law fraud with respect to the 1978 and 1980 year-end appraisals, and (iii) denied as to plaintiffs' prayer for punitive damages.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 84-0447
(Parker, J.)

CHARLES S. FOLTZ, *et al.*,
Plaintiffs,

v.

U.S. NEWS & WORLD REPORT, INC. *et al.*,
Defendants.

Civil Action No. 85-2195
(Parker, J.)

DAVID B. RICHARDSON, *et al.*,
Plaintiffs,

v.

U.S. NEWS & WORLD REPORT, INC. *et al.*,
Defendants.

Civil Action No. 86-0156
(Parker, J.)

ESTATE OF BEN GRANT,
Plaintiff,

v.

U.S. NEWS & WORLD REPORT, INC. *et al.*,
Defendants.

FILED
MAR 3 1986

ORDER

Upon consideration of the motions filed by plaintiffs in *David B. Richardson, et al. v. U.S. News & World Report, Inc. et al.*, Civil Action No. 85-2195 ("*Richardson*") and *Estate of Ben Grant v. U.S. News & World Report, Inc. et al.*, Civil Action No. 86-0156 ("*Grant*"), to consolidate such cases with *Charles S. Foltz, et al. v. U.S. News & World Report, Inc. et al.*, Civil Action No. 84-0447 ("*Foltz*"), the response of defendants to such motions, and the stipulation of the parties, it is this 3rd day of March, 1986, ORDERED as follows:

1. *Grant, Richardson,* and *Foltz,* are consolidated for purposes of pretrial and trial.

2. Any discovery taken heretofore and hereafter in *Foltz, Richardson,* or *Grant* may be used in all three such actions for any purpose to the same extent as if such discovery had been taken in all three actions.

3. Pursuant to the consent of plaintiffs in *Richardson,* Count VIII of the Second Amended Complaint in *Richardson,* asserting a claim under the Racketeer Influenced and Corrupt Organizations Act of 1970 ("RICO"), is hereby dismissed with prejudice.

4. Pursuant to the consent of the plaintiff in *Grant,* any claims such plaintiff has against defendants under RICO are hereby dismissed with prejudice.

5. Defendants Gretchen D. Langston, James Glassman, John W. Mashek and Neil O. Rice have filed motions to dismiss the claims against them in *Grant.* Plaintiff in *Grant* opposes such motions on the grounds asserted by the plaintiffs in *Foltz* and *Richardson* in opposition to similar motions. For the reasons stated in this Court's Orders of November 26, 1985 in *Foltz* and *Richardson,* the claims against defendants Langston, Glassman, Mashek, and Rice in *Grant* are dismissed without prejudice.

6. The remaining defendants plan to file summary judgment or other dispositive motions in *Richardson* and *Grant* based in part upon the grounds asserted in the summary judgment and other dispositive motions they filed in *Foltz*. To the extent that such motions in *Richardson* and *Grant* were based upon grounds asserted in the motions filed in *Foltz*, plaintiffs in *Richardson* and *Grant* would oppose such motions on the grounds asserted by plaintiffs in *Foltz*. In light of the Court's intention to treat its memorandum Opinion of January 15, 1986 in *Foltz* as law of the case in *Richardson* and *Grant*, the Court and the parties agree that, with respect to certain of the issues which would be raised by defendants' summary judgment or other dispositive motions in *Richardson* and *Grant*, there is no need for additional briefing. Accordingly, upon consideration of the record in this case, for the reasons set forth in such Memorandum Opinion, which is incorporated herein by reference, the Court rules as follows in paragraphs 7 and 8 with respect to certain of the claims made in *Richardson* and *Grant*.

7. *Richardson:* The Court grants partial summary judgment as follows:

U.S. NEWS AND THE DIRECTOR-DEFENDANTS

(a) As to plaintiffs' claims under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission (Count I of the Second Amended Complaint), summary judgment is granted for these defendants as to plaintiffs' prayers for punitive damages.

(b) As to plaintiffs' claims arising under Section 502(a)(3) of ERISA (Count II of the Second Amended Complaint), summary judgment is granted for these defendants as to plaintiffs' prayer for punitive damages.

AMERICAN APPRAISAL ASSOCIATES

(a) As to the plaintiffs' claims arising under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission (Count I of the Second Amended Complaint), summary judgment is granted for this defendant as to plaintiffs' prayer for punitive damages;

(b) As to plaintiffs' claim arising under Section 502(a)(3) of ERISA (Count II of the Second Amended Complaint), summary judgment is granted for this defendant as to plaintiffs' claims for punitive damages.

(c) As to plaintiffs' claims for negligence (Count VI of the Second Amended Complaint), summary judgment is granted for this defendant.

8. *Grant:*

U.S. NEWS DEFENDANTS AND JOHN H. SWEET

Partial summary judgment is granted for these defendants as follows:

(a) As to plaintiff's claims arising under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission (Count I of the First Amended Complaint), summary judgment is granted for these defendants (i) as to plaintiff's interest in the Profit-Sharing Plan, and (ii) as to plaintiff's prayer for punitive damages;

(b) As to plaintiff's claims arising under Section 502(a)(3) of ERISA (Count II of the First Amended Complaint), summary judgment is granted for these defendants (i) as to plaintiff's stock interest, and (ii) as to plaintiff's prayer for punitive damages;

(c) As to plaintiff's claims arising under Section 502(a)(1)(B) of ERISA (Count II of the First Amended

Complaint), summary judgement is granted for these defendants with respect to plaintiff's stock interest;

(d) As to plaintiff's claims for common-law fraud and constructive fraud (Count III of the First Amended Complaint), unjust enrichment (Count IV), and negligence and negligent mispresentation (Count V), summary judgment is granted for these defendants (i) with respect to plaintiff's claims for constructive fraud, and (ii) with respect to plaintiff's interest in the Profit-Sharing Plan.

AMERICAN APPRAISAL ASSOCIATES

Summary judgment is granted for this defendant as to all claims brought by plaintiff on the basis of the statutes of limitations. In addition, summary judgment is granted on alternative grounds with respect to certain of the claims as follows:

(a) As to plaintiff's claims arising under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 of the Securities and Exchange Commission, summary judgment is granted (i) as to plaintiff's interest in the Profit-Sharing Plan, and (ii) as to plaintiff's prayer for punitive damages.

(b) As to plaintiff's claims arising under Section 502(a)(3) of ERISA (Count II of the First Amended Complaint), summary judgment is granted for this defendant (i) as to plaintiff's stock interest, and (ii) as to plaintiff's prayer for punitive damages;

(c) As to plaintiff's claims for common law fraud and constructive fraud (Count III of the First Amended Complaint), and negligence and negligent misrepresentation (Count V), summary judgment is granted for this defendant (i) with respect to plaintiff's claims with respect to plaintiff's interest in the Profit-Sharing Plan, (ii) with respect to plaintiff's claims for common law fraud and constructive fraud, and (iii) with respect to plaintiff's claims for negligence and negligent misrepresentation.

9. By agreeing to this expedited procedure for ruling on certain claims in paragraphs 5, 7 and 8, above, no party in *Richardson* or *Grant* shall be deemed to have consented to the merits of such rulings. All parties in *Richardson* and *Grant* shall preserve their rights to an appeal with respect to such rulings in paragraphs 5, 7 and 8, to the same extent as if such rulings had been made after the filing of motions and briefs similar to those filed in *Foltz*.

10. Defendants shall be permitted to file additional dispositive motions in *Richardson* and *Grant* with respect to any claims not dismissed above.

/s/ Barrington D. Parker
United States District Judge

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civ. A. No. 85-2195.

David B. RICHARDSON, *et al*,
Plaintiffs,

v.

U.S. NEWS & WORLD REPORT, INC., *et al.*,
Defendants.

July 7, 1986.

MEMORANDUM OPINION

BARRINGTON D. PARKER, Senior District Judge:

On July 10, 1985, plaintiffs filed this action against their former employer, U.S. News & World Report, Inc. ("U.S News" or "Company"), a weekly news magazine, as well as against eight of its former directors, the U.S. News Profit-Sharing Plan ("Plan"), and American Appraisal Associates, Inc. ("American Appraisal"), an independent appraisal firm. They charge that defendants collectively suppressed the value of the retirement benefits that they received upon separation from the Company through their participation in the Plan and through resale of shares of common stock issued them in connection with a stock bonus plan.

Plaintiffs[1] are, with one exception,[2] former employee-shareholders of U.S. News, who retired from U.S. News

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[1] Plaintiffs are David B. Richardson, Luther A. Dawson, Del Truitt, George H. Mikesell, Joseph B. LeCompte, Jr., Martha B. Strube, Dorothy G. Haller and Richard P. Stifel.

[2] Plaintiff Dorothy G. Haller is suing as the personal representative

in 1982. Employees who had separated from the Company between 1974 and 1981 instituted a class action suit against these same defendants in February 1984, *Charles S. Foltz, et al. v. U.S. News & World Report, Inc., et al.*, C.A. No. 84-0447. The two cases were consolidated for pretrial and trial by Order of March 3, 1986.

Currently before the Court are defendants' motions for summary judgment. For the reasons set forth below, the Court grants in part and denies in part those motions, as follows:

(1) the claims of plaintiffs Haller, LeCompte, Stifel, Strube, and Truitt for benefits due under the Employee Retirement Income Security Act of 1974 ("ERISA") § 502(a)(1)(B), for breach of the fiduciary duty of care under ERISA § 502(a)(3), and for negligence are time-barred;

(2) plaintiffs' claims for securities and common-law fraud are dismissed in part;

(3) plaintiffs' claims under ERISA § 502(a)(3) are dismissed in part; plaintiffs' claims under ERISA § 502(a)(1)(B) that are not time-barred may proceed to trial; and

(4) plaintiffs' common-law claims are dismissed in part.

BACKGROUND

The facts leading up to the filing of *Foltz*, as well as the general background of this litigation, have been ex-

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of Ellis M. Haller, a U.S. News employee who died in 1981. Because his bonus shares were repurchased by U.S. News in that year, he is a member of the plaintiff class in *Foltz, et al. v. U.S. News & World Report, Inc., et al., see infra*, as to claims relating to the stock bonus plan. His Plan account, however, was not settled until 1982.

tensively treated elsewhere.[3] A few of those facts, however, need to be restated, if only in barest outline.

Between the time of its reorganization in 1962 and its sale in 1984, U.S. News was an entirely employee-owned company. Pursuant to the Articles of Incorporation, employees were issued, under a stock bonus plan, shares of non-transferable common stock at regular intervals. In addition, employees received an undivided interest in the Profit-Sharing Plan, in accordance with a formula based upon salary and term of service. Upon separation, each employee was required to offer his bonus shares back to the Company for repurchase and was entitled to liquidate his Plan account.[4]

The price that a retiring employee received per share of bonus stock was based upon annual valuations conducted by American Appraisal, in accordance with Article Fifth (e) of the Articles of Incorporation. The per share value of the Company's stock also determined the value of each employee's interest in the Plan, whose major asset was a 50,000 share block of U.S. News stock.[5] In arriving at a value for the Company as a whole, American Appraisal gave some consideration to U.S. News' extensive real estate holdings in the West End of Washington, D.C.

While the real estate did not always figure highly in the appraisal, by 1981 sufficient headway had been made in developing the U.S. News holdings that American Ap-

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[3] *See* this Court's prior opinions at 627 F.Supp. 1143 (1986); 613 F.Supp. 634 (1985); and 608 F.Supp. 1332 (1985), that of the Court of Appeals, 760 F.2d 1300 (D.C.Cir.1985), as well as the recent Memorandum Opinions of June 12, 1986 in *Estate of Ben Grant v. U.S. News & World Report, Inc., et al.*, 639 F.Supp. 342 and in *Foltz*, 111 F.R.D. 49 (1986).

[4] The liquidation could take three forms: a lump-sum cash payment, an annuity, or continued investment in the Plan.

[5] The Plan also maintained a modest portfolio of investment securities and received cash contributions from U.S. News.

praisal valued the real estate separately from the operating business of the magazine. In that year, a series of six joint venture agreements were entered into between U.S. News and Boston Properties, Inc., whereby U.S. News assigned its real estate holdings to Boston Properties, in exchange for a 50 percent equity interest in the joint ventures. As a result of the anticipated profitability of the joint ventures, the appraised value of the company's stock increased more than three-fold over its 1980 value of $152 per share.

In 1984, U.S. News, including its interest in the joint ventures, was sold to Mortimer Zuckerman, a real estate and publishing entrepreneur and principal of Boston Properties. The sale price of $176 million meant that current employees of U.S. News would receive approximately $2,800 per share for their interest in the Company. Plaintiffs, who received only $470 per share based upon the 1981 year-end appraisal, believe that the value of the stock had been previously suppressed, principally by a conservative treatment of the real estate and by a refusal to value the 50,000 share block held by the Plan on a control-premium basis. In addition, plaintiffs allege that U.S. News fraudulently withheld information concerning its real estate development plans, including a "secret" intent to sell the Company, from its employees and from American Appraisal and that U.S. News conspired with American Appraisal to arrive at a "negotiated" value for its stock.

Corresponding to these sets of facts, plaintiffs bring claims[6] against U.S. News, the directors, and American Appraisal for securities fraud in violation of section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b),

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[6] Plaintiffs' Second Amended Complaint, filed February 3, 1986 in order to facilitate consolidation with *Foltz*, is, by stipulation of the parties approved by the Court on March 3, 1986, to be read consistently with the rulings set down in this Court's Memorandum Opinion of January 15, 1986, 627 F.Supp. 1143 (1986), disposing of various legal issues in connection with the *Foltz* litigation.

and Rule 10b-5 of the Securities and Exchange Commission, 17 C.F.R. § 240.10b-5, breach of fiduciary duty in violation of section 404(a) of ERISA, 29 U.S. § 1104(a),[7] and for common-law fraud. Plaintiffs also bring against only U.S. News and its directors claims for common-law breach of fiduciary duty, unjust enrichment, and negligence. Against the Plan plaintiffs' claim is limited, as it must be, to an action for benefits due under section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B).

ANALYSIS

Defendants move for summary judgment on several grounds. All defendants charge that a number of the claims asserted are time-barred. U.S. News, the directors, and American Appraisal also urge the Court to hold that there is insufficient record evidence to support a rational inference of fraudulent conduct on which to premise a claim for securities or common-law fraud. Those defendants further argue that plaintiffs' ERISA claims against them will not withstand scrutiny, whether they are based upon intentional or negligent conduct. Finally, U.S. News and the directors contend that the claims for common-law breach of fiduciary duty and unjust enrichment, premised as they are upon defendants' alleged intentional conduct, must fail for the same reasons as the fraud claims, and that plaintiffs' negligence claim similarly is as factually barren as their ERISA claim.

In brief, plaintiffs' claims can be grouped together into two categories. The first category encompasses those claims premised upon negligent, imprudent, or arbitrary conduct: plaintiffs' claims under ERISA § 502(a)(1)(B) and,

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[7] Plaintiffs seek to enforce the provisions of section 404(a) by an action under section 502(a)(3), 29 U.S.C. § 1132(a)(3), which this Court has interpreted as allowing such relief. *See Foltz*, 627 F.Supp. at 1165-68.

possibly[8] § 502(a)(3), as well as their negligence claim. The second category includes those claims grounded in fraudulent or willful conduct: plaintiffs' claims for securities and common-law fraud, intentional breach of fiduciary under ERISA § 502(a)(3), common-law breach of fiduciary duty, and unjust enrichment.

The facts underlying claims in the first category speak to whether U.S. News and its directors provided American Appraisal with adequate information, whether American Appraisal properly conducted the appraisal, and whether American Appraisal's work was properly scrutinized by U.S. News. Facts suggested to support claims in the second category surround U.S. News' alleged withholding of information from its employees and from American Appraisal, particularly a "secret" intent to sell the company, and an alleged conspiracy between U.S. News and American Appraisal to arrive at a "negotiated" value for the magazine's stock. Keeping separate these two sets of facts, together with the corresponding categories of claims, aids greatly in an analysis of defendants' motions and of the record.

A.

STATUTE OF LIMITATIONS

1. Do plaintiffs have one or two causes of action?

From the foregoing discussion, it appears that plaintiffs may actually have two causes of action, one for improperly

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[8] Although plaintiffs' claim under ERISA § 502(a)(3) is pleaded in terms of intentional or willful conduct, a liberal reading of their complaint would contemplate a charge for breach of the fiduciary duty of *care* under ERISA § 404(a), a negligence-based claim. *See infra* at 608; *see also Massachusetts Mut. Life Ins. Co. v. Russell*, ___U.S. ___, 105 S.Ct. 3085, 3091 n. 10, 87 L.Ed.2d 96 (1985); *Donovan v. Cunningham*, 716 F.2d 1455, 1463-64 (5thCir.1983), *cert. denied*, 467 U.S. 1251, 104 S.Ct. 3533, 82 L.Ed.2d 839 (1984); *Foltz*, 627 F.Supp. at 1175 & n. 74.

calculated benefits, and one for wrongfully and willfully withheld benefits. The question rises to crucial importance in analyzing whether any of plaintiffs' claims are time-barred, or whether the statute of limitations must be tolled under the doctrine of fraudulent concealment as to some or all of them.

It is undisputed that the claims of some of the plaintiffs, as well as the securities claims of all of them, are outside the relevant limitations periods.[9] To come, then, within the ambit of tolling doctrine, plaintiffs must demonstrate that (1) defendants engaged in some fraudulent or deceptive course of conduct that successfully concealed facts underlying their cause of action, and that (2) they were not on notice of those facts, despite (3) the exercise of due diligence. *Hobson v. Wilson*, 737 F.2d 1, 33-36 (D.C.Cir.1984), *cert.-denied sub nom. Brennan v. Hobson*, ___ U.S. ___, 105 S.Ct. 1843, 85 L.Ed.2d 142 (1985).

The question that then arises is what constitutes plaintiffs' "cause of action." To impute notice to a plaintiff such as to start the statute running, it must be that the plaintiff was aware of "facts giving notice of the particular cause of action at issue, not of just any cause of action." *Hobson*, 737 F.2d at 35. In this connection, counsel for the Plan reluctantly raises the possibility that plaintiffs' cause of action indeed may be two-fold, with the result that notice of facts underlying one will not impute notice of the existence of the other. In other words, merely because plaintiffs may have been aware that the real estate may not have been properly accounted for in the appraisals would not start the clock running on a claim that defendants "negotiated" a per share value for the Company's stock. The most that could be said, then, is that a

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[9] *See infra* at 600-601.

claim for improperly, as opposed to wrongfully, determined benefits would be time-barred.[10]

As the Plan's counsel suggests, a look at *Richards v. Mileski*, 662 F.2D 65 (D.C.Cir.1981), may prove instructive. In *Richards*, the plaintiff was coerced into resigning his government position by what his superiors held out to be reports of his homosexual activity. Although Richards of course knew at the time of his resignation that the reports were false, he did not know of facts—learned some twenty years later—suggesting that his superiors had fabricated or at least had maliciously utilized the false reports to secure his resignation. Finding that a claim for intentional wrongdoing, based upon the subsequently learned facts, had been fraudulently concealed by the defendants, the court held that awareness at the time of his resignation of the alleged reports' falsity was insufficient to put Richards on notice of a claim premised upon malicious conduct. 662 F.2d at 69. Within the limitations period running from the time of his resignation, Richards could have only brought a claim for wrongful discharge, an entirely different claim from the one actually brought much later. *Id.*

The Court finds the rationale of *Richards* to be persuasive. As outlined above, the facts underlying plaintiffs' claims for intentional and fraudulent conduct are distinct from those supporting their claims premised upon lesser degrees of fault. To impute notice to them of the former claims, based upon knowledge of facts underlying the later,

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[10] In analyzing whether plaintiffs have one or two causes of action, one test that suggests itself is whether a second claim for wrongfully withheld benefits would be precluded by *res judicata* upon the litigation of a prior claim for improperly calculated benefits. However, such a test for determining the unity of a cause of action, based upon the rule against the splitting of claims, *see* 1B *Moore's Federal Practice* ¶ 0.410[1] (1984), has been squarely rejected in this Circuit. *Wilson v. Johns-Manville Sales Corp.*, 684 F.2d 111, 117-18 & n. 36 (D.C.Cir. 1982).

would would be to attribute to them a prescience beyond that which the *Richards* court deemed appropriate.[11]

Accordingly, the Court holds that, for statute of limitations purposes, plaintiffs have two causes of action, as outlined above.

2. Claims that would otherwise be time-barred

Plaintiffs LeCompte, Strube, and Truitt, liquidated their Plan accounts and resold their bonus shares prior to July 10, 1982, or more than three years before filing suit. Ellis M. Haller, the decedent of plaintiff Dorothy G. Haller, had his bonus shares repurchased upon his death in 1981; his Plan account was settled in May 1982.[12] Plaintiff Stifel resold his bonus shares in April 1982, but continues as a participant in the Plan to this date. Because the claims of these plaintiffs accrued more than three years before the instant suit was filed, any cause of action for violation of ERISA and any common-law claims would be time-barred absent tolling of the statute. 29 U.S.C. § 1113; D.C.Code Ann. § 12-301(7), (8) (Michie 1981).[13] In addition, because the limitations period in the District of Columbia for a claim for securities fraud is two years, *Wachovia Bank & Trust Co. v. Nat'l Student Marketing Corp.*, 650 F.2d 342, 346-48 (D.C.Cir.1980), *cert. denied*, 452 U.S. 954, 101 S.Ct. 3098, 69 L.Ed.2d 965 (1981), the securities claims of the remaining plaintiffs would be otherwise untimely.

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[11] *See infra* at 601-602.

[12] *See supra* note 2. As noted, Mr. Haller's interest in the stock bonus plan forms a basis for his inclusion in the *Foltz* class and consequently is not a subject of this suit.

[13] The limitations period provided by ERISA for a claim for breach of fiduciary duty is three years if a potential plaintiff was on notice of his cause of action. 29 U.S.C. § 1113(a)(2)(A). Because the Court finds that these plaintiffs had such notice, the three year period does indeed apply.

3. Tolling as to claims involving elements of intent or fraud

As outlined above, one category of claims brought by plaintiffs—those for securities and common-law fraud, breach of fiduciary duty under ERISA and the common law, and unjust enrichment—derive support from defendants' allegedly intentional or fraudulent conduct. That conduct is said to involve (1) the failure of U.S. News and its directors to provide American Appraisal with all information relevant to the magazine's real estate development plans; (2) those defendants' failure to provide that information to the employees; (3) those defendants' failure to disclose their "secret" intent to sell the company, and (4) the conspiracy entered into by those defendants and American Appraisal to arrive at a "negotiated" value for the magazine's stock.

Item (1) above will be discussed later in the context of defendants' motion for summary judgment on the merits of plaintiffs' securities and fraud claims. Suffice it to say now that, because the record reveals no support for the proposition that any relevant information was withheld from American Appraisal, the Court need not reach the question of whether a claim premised upon such an allegation is time-barred. Item (2) is discussed in connection with whether plaintiffs' claims for other than fraudulent or intentional conduct are time-barred.

Turning to items (3) and (4), the Court notes that, if there is any substance to plaintiffs' allegations, they certainly could not have been on notice of the facts in question.[14] It is not argued by defendants that plaintiffs knew of the key fact that plaintiffs say supports an inference

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[14] The Plan seems to recognize that notice is not the issue as to plaintiffs "fraud-based" claims, for that defendant addresses those claims separately in its reply memorandum *on the merits*, apparently conceding that plaintiffs could not have been *aware* of the conduct in question, quite apart from whether it was indeed fraudulent.

of an intent to sell the company—the acceleration of certain deferred compensation rights or "phantom stock" in March of 1982, supposedly in anticipation of an imminent sale. Nor do defendants suggest that plaintiffs were privy to the communications that took place between representatives of U.S. News and American Appraisal in connection with the conduct of the 1981 year-end appraisal, from which plaintiffs infer a "negotiated" valuation.

If plaintiffs cannot be held to have been on notice of those facts outlined above, the issue is whether there was any fraudulent concealment of those facts. Moreover, because any concealment was effected by the nature of the alleged wrongs themselves—in other words, because of the element of secrecy alleged—the issue becomes simply one of whether the conduct charged was fraudulent or not.[15] The relevant inquiry thus merges with a discussion of the merits of plaintiffs' claims and will be deferred accordingly.

Accordingly, the Court holds that none of plaintiffs' claims for securities or common-law fraud, intentional breach of fiduciary duty under ERISA § 502(a)(3), common-law breach of fiduciary duty, or unjust enrichment are time-barred.

4. Tolling as to claims not involving elements of intent or fraud

It is axiomatic that a wrong that itself is not a fraud cannot constitute a "self-concealing" wrong within the scope of the fraudulent concealment doctrine. *See Hobson*, 737 F.2d at 33 & n. 102. For the statute to be tolled, then, such a wrong must have been concealed by subsequent fraudulent acts. *Id.* Hence, to prevail on their assertion that their claims based on other than fraudulent conduct were fraudulently concealed, plaintiffs must dem-

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[15] In other words, the wrongs allegedly perpetrated by defendants were "self-concealing." *See Hobson*, 737 F.2d at 33.

onstrate that defendants engaged in a course of conduct to cover up the wrongs allegedly committed. Yet plaintiffs have never argued that any such *subsequent* course of conduct occurred. Even if they did make such an argument, it would be to no avail, for not only does the record reveal no evidence of a scheme to cover up the wrongs alleged, but it indicates, rather, that at least some of the plaintiffs were on notice of facts underlying their claims. And such notice, of course, would defeat any claim of fraudulent concealment. *Hobson*, 737 F.2d at 35. Conversely, in the absence of any course of fraudulent conduct designed to conceal a cause of action, notice on plaintiffs' part need not be shown in order to defeat a claim that the statute should be tolled.

Whatever may be said of the degree to which U.S. News kept its employees apprised of the status of its real estate development plans during the *Foltz* class period, *see* 627 F.Supp. at 1152, by 1981, when the joint ventures were entered into, efforts at disclosure were made sufficient to negate any inference that U.S. News was attempting to keep the value of its real estate holdings secret. Indeed, any such attempt would have been futile. As early as September 1981, the Washington Post published an article outlining the business successes of U.S. News, including its ambitious real estate joint venture with Boston Properties. Nor was media coverage limited to that one piece. *See* Exhibit B to U.S. News and Director Defendants' Reply to *Richardson* Plaintiffs' Opposition to Motion for Summary Judgment.

Moreover, disclosure was not confined to reports from outside sources. In March 1982, U.S. News held a series of seminars designed to inform its employees of the impact—because of the three-fold increase in the appraised value of U.S. News' stock—that the joint ventures would have on their retirement benefits. During the course of the seminars, employees were told that the real estate had previously been carried on the books at only "assessment

value," Statement of the Profit-Sharing Plan of U.S. News & World Report Inc., of Material Facts as to Which There is No Genuine Dispute, Appendix 5 ("Plan App. 5") at 1 (Transcript of March 23, 1982 Profit-Sharing Seminar), that the fruition of U.S. News' real estate development plans had resulted in "a sudden surge in the stock price," *id.* at 6, and most importantly that American Appraisal's approach in valuing the real estate—even at that late date—was fairly conservative. *Id.* at 17-18, 29. In addition, in a standard memorandum to retiring employees outlining the options available to them for liquidation of their Plan accounts, U.S. News informed Plan participants that its real estate development "may cause the Company stock to increase substantially in value." Haller Deposition Exhibit No. 4 (January 14, 1981). Thus it appears that, not only did U.S. News not attempt to conceal the value of its real estate, it revealed that it might be worth even more than its appraised value. Such disclosure is certainly inconsistent with a scheme to fraudulently conceal a plan to depress the value of the magazine's stock through an undervaluation of its real estate.

As stated earlier, whether plaintiffs were actually on notice of the real estate development plans is irrelevant, as long as there exists no record evidence from which an inference of fraudulent concealment may be drawn. In other words, defendants need not demonstrate that all of the plaintiffs whose claims would otherwise fall outside the limitations period were actually at the profit-sharing seminars, or that they read pertinent media accounts of developments in the West End.[16] It is enough to demonstrate

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[16] If actual notice were the standard, defendants would be at least partially successful in defeating plaintiffs' claims that their cause of action was fraudulently concealed. Plaintiff LeCompte, if no one else among those whose claims would be otherwise time-barred, actually attended the March 1982 seminar. Deposition (Nov. 14, 1985) at 60. He and plaintiffs Truitt and Stifel testified specifically that they at-

that their ignorance was due to circumstances not caused by any fraudulent conduct on defendants' part. The Court finds that defendants have met their burden.

Accordingly, the claims of plaintiffs Haller, LeCompte, Stifel, Strube and Truitt for benefits due under ERISA § 502(a)(1)(B), for breach of the fiduciary duty of care under ERISA § 502(a)(3), and for negligence are dismissed as untimely filed.

B.

CLAIMS FOR SECURITIES AND COMMON-LAW FRAUD

As stated previously, plaintiffs' claims for securities and common-law fraud are predicated upon wrongful conduct of U.S. News and its directors in allegedly (1) withholding relevant information from American Appraisal concerning the real estate holdings; (2) withholding such information from U.S. News employees; (3) harboring a "secret" intent to sell the Company; and (4) "negotiating" a per share value for the Company's stock. Liability against American Appraisal is asserted in connection with item (4), as well as its general appraisal methodology.

Item (2) has already been discussed in connection with the untimeliness of plaintiffs' "non-fraud" claims; except in conjunction with items (3) and (4), there is no record

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tended the 1978 shareholder luncheon, at which American Appraisal's general methodology was outlined, including its use of a minority interest valuation. LeCompte Deposition at 18 (attended *all* the luncheons); Deposition of Del F. Truitt (Dec. 17, 1985) at 90-92; Deposition of Richard P. Stifel (Nov. 6, 7, 1985) at 156, 230-32. Plaintiff Haller testified that her husband usually attended the luncheons. Deposition of Dorothy G. Haller (Dec. 18, 1985) at 8. Mrs. Haller also testified that her husband told her that the magazine's real estate development would probably increase substantially the value of its stock. *Id.* at 29-30, 62-63. Finally, at least two of the plaintiffs in this group knew of the existence of the appraisal reports, which would have indicated in detail American Appraisal's methodology. LeCompte Deposition (Nov. 13, 1985) at 48; Truitt Deposition at 80.

evidence from which can be drawn an inference that defendants withheld relevant information from the U.S. News employees.

Similarly, because a defendant cannot be held liable under the securities laws when it has in fact disclosed the relevant material facts, *Foltz*, 627 F.Supp. at 1161-63, no claim for securities fraud will lie against American Appraisal to the extent that it arises out of aspects of that defendants' appraisal methodology that were fully disclosed in its report. Similar reasoning applies to plaintiffs' common-law fraud claims against American Appraisal.[17] Accordingly, the only possible claims for securities and common-law fraud that may be asserted against American Appraisal concern that defendants' involvement with U.S. News in the alleged "negotiation" of a final per share value.

Left for discussion, then, are items (1), (3), and (4), which will be taken up in turn.

1. Withholding information from American Appraisal

It is indisputable that U.S. News provided American Appraisal with all information relevant to the 1981 joint venture agreements. In claiming that U.S. News withheld information relevant to a valuation of its real estate, plaintiffs point only to the fact that U.S. News did not furnish American Appraisal with certain studies analyzing real estate development possibilities, prepared prior to the negotiation of the joint venture agreements. Included in this category of information were a study conducted by

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[17] Since an essential element of common-law fraud is the making of "a deliberate misstatement of fact . . . with the intent to deceive another person," *Shear v. Nat'l Rifle Ass'n of America*, 606 F.2d 1251, 1259 (D.C.Cir.1979), American Appraisal's *disclosure* of its methodology must necessarily shield it from claims that it was attempting to *deceive* plaintiffs as to elements of that methodology. *See Foltz*, 627 F.Supp. at 1179.

the law firm of Arnold & Porter dated January 28, 1981, analyzing real estate development and sale possibilities; discussions in April 1980 with the Oliver T. Carr Company concerning development of a portion of the magazine's excess real estate, and a report dated December 8, 1980, prepared by Julien Studley, Inc., again concerning possible development plans.

Plaintiffs have made absolutely no showing of any relevance that the above information would have had for an appraisal of U.S. News' interests in the joint ventures as they were actually formalized. Nor have they adduced any evidence indicating that the earlier reports were intentionally withheld, nor any motive on U.S. News' part for so withholding them.[18] In short, while plaintiffs have come up with a "fact," they have not demonstrated its materiality to the subject matter of this litigation. Accordingly, judgment for defendants will be entered as to this issue.

2. Harboring an intent to sell the company

Plaintiffs' claim that U.S News and its directors harbored a "secret" intent to sell the Company, which was not revealed to American Appraisal, is supported—if at all—by an inference that awards of deferred compensation rights or "phantom stock" to certain of the directors were accelerated in anticipation of an imminent sale. While it is indisputably true that such acceleration did take place in March of 1982, it is not clear what can be made of it.

Defendants point out, first, that there are entirely innocent explanations for the acceleration of the awards.

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[18] In their opposition to defendants' motions, plaintiffs apparently shift ground and contend that the earlier real estate studies had been withheld from the *U.S. News employees*. Whether or not these studies themselves were provided to the employees, by late 1981, U.S. News had made efforts to make its employees aware of the potential impact on their retirement accounts that a plan for development of the magazine's real estate might have had. *See supra* at 602-603.

One such explanation is that, as indicated in the minutes of the Board meeting of March 9, 1982, there was concern that several "classes" of directors would be created by a maintenance of the then status quo, whereby awards were made in installments, requiring that newer directors "catch up" to their more senior colleagues. PX 320 at 12-14.[19] The other explanation is that, because the Plan was facing liquidity problems due to the sudden surge in the price of the magazine's stock, it was decided that all the directors should bear the same financial exposure in the face of uncertainty as to the future course to be taken by the company. Deposition of James H. McIlhenny (Aug. 1, 1984) at 10-11.

Defendants further maintain that the existence of any "secret" intent to sell U.S. News is rendered impossible by the presence in the record of certain objective evidence indicating that the Company would *not* be sold. First, the Company's long-standing policy of remaining employee-owned retained its vitality even in the face of the Plan's liquidity problems. While one solution proposed to alleviate the liquidity crisis was to sell the Company, management regarded this as an undesirable option. *See* Plan App. 5 at 1, 33 (March 23, 1982 Profit-Sharing Seminar). Instead, management sought to ameliorate the liquidity problem by amending the Plan to provide for the issuance of 15 year notes to retiring employees in lieu of lump-sum settlements. *Id.* at 3-8. The proposed amendment was filed with the Department of Labor for approval. To be sure, that filing might have been part of an elaborate hoax on the part of U.S. News management designed to cover up some secret plan to sell the Company while taking as much "cream" off the top as possible. Yet in the absence of any record evidence to support such a theory, no jury would

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[19] "PX" refers to deposition exhibits designated by plaintiffs in the *Foltz* case.

be entitled to infer that any secret intent to sell existed at the time.[20]

The doubtfulness of plaintiffs' claim that such an intent to sell existed is further underscored by additional objective evidence that the Company was not for sale. Its ultimate purchaser, Mortimer Zuckerman, testified that he was consistently rebuffed during the course of offers to buy that he made between 1981 and 1983. Deposition (Oct. 31, 1984) at 25, 27-29. Although it is possible that he was turned down because his offers were not sufficiently enticing, he testified rather that "they did not choose to sell the company." *Id.* at 28.

Finally, one should note that the Company was not, in fact, sold until 1984. Consequently, even if an "intent" to sell existed, it was never brought to fruition and consequently could not have been relevant to an appraisal of the Company as of December 1981. Indeed, the American Appraisal representative who supervised the appraisal testified that only a firm plan to sell the Company in the immediately following year would have prompted any discussion concerning whether such a plan should be reflected in the appraisal. Deposition of John G. Russell (Aug. 21, 1984) at 276-77. The alleged withholding from American Appraisal of a vague and never-realized intent to sell certainly cannot form the basis of a fraud claim, especially when the Company was *not* sold at or subsequent to the time when the intent was said to have been harbored.

In sum, the only evidence available to counter the objective evidence that U.S. News was not for sale is sub-

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[20] *Plaintiffs' counsel as much as conceded during oral argument that he would attempt to develop his case through cross examination at trial, Transcript of Proceedings (May 13, 1986) at 72-73, 84-85,* yet at the same time stated that he was willing to "stand on the record" for purposes of the instant motions. *Id.* at 73. Counsel will not be permitted to embark on a fishing expedition at trial as to matters that will not presently withstand a motion for summary judgment.

jective evidence based upon an inference that the phantom stock awards were accelerated in anticipation of a sale. Yet while all inferences must be drawn in favor of the nonmoving party—here, the plaintiffs—in light of the objective record evidence, the acceleration of the phantom stock awards at most points towards avarice on the part of the U.S. News Board, not any intent to sell the company. In the absence of "persuasive evidence" tending to overcome the implausibility of plaintiffs' claim and the objective evidence to the contrary, *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, ___U.S. ___, 106 S.Ct. 1348, 1356-57, 89 L.Ed.2d 538 (1986), summary judgment is appropriate on this issue.

Accordingly, defendants' motions of summary judgment are granted as to plaintiffs' claim that U.S. News and its directors were possessed of an intent to sell the company, which they withheld from American Appraisal and their employees.

3. Negotiation of a final per share value

Likewise, plaintiffs' claim that U.S. News and American Appraisal conspired to "negotiate" a final per share value for the Company's stock does not withstand scrutiny. While plaintiffs cite numerous portions of the record to support their claim, careful study of the relevant documents and testimony reveals no facts from which a jury could rationally infer that defendants engaged in conduct that was in any way fraudulent. Accordingly, defendants are granted summary judgment on this aspect of plaintiffs' securities and common-law fraud claims.

Under plaintiffs' theory, the "negotiation" involved three steps. First, U.S. News apprised American Appraisal of the liquidity problems faced by the Plan, *see* PX 108, 175 (notes of January 27, 1982 meeting); Deposition of David T. Marshall[21] (Aug. 9, 1984) at 695, and also provided

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[21] Mr. Marshall, under the supervision of Mr. Russell, prepared the appraisal.

American Appraisal with a range of possible values of $400-$450, calculated by chief financial officer Ray Naimoli. PX 107 at 2 (notes of John G. Russell *re:* February 26, 1982 review with David T. Marshall); Deposition of John G. Russell (Aug. 21, 1984) at 364. Next, Mr. Russell and Mr. Marshall made some preliminary calculations, which they then conveyed to U.S. News. Finally, those preliminary calculations were adjusted downward in a series of steps, allegedly as a result of U.S. News pressure.

The first issue that must be addressed is the nature of the "preliminary" figures that American Appraisal gave to U.S. News. Plaintiffs contend that they were suggested final values, while defendants maintain that they were only partial totals that did not reflect the application of a minority discount. A review of the record bears out defendants' understanding of the figures arrived at separately by Mr. Marshall and Mr. Russell, from which a range was developed and conveyed to U.S. News. Mr. Marshall calculated that the stock was worth $620 per share, PX 107, but that figure did not include a minority discount. Deposition (Aug. 9, 1984) at 655-56, 658, 660; Deposition (Sept. 12, 1984) at 848-49;[22] *see also* Russell Deposition at 363. Mr. Russell arrived at a range of $545 to $580 per share, after discounting the value of the real estate at 20 percent to reflect a minority interest. PX 107; Deposition at 362-63. Mr. Russell then phoned a range of $550 to $625 in to Mr. Naimoli as preliminary estimates. *Id.* at 366-67. The figure representing the upper end of the range, taken from Mr. Marshall's calculations, did not reflect the application of a minority discount. *Id.* at 363. In short, at least a portion of the downward adjustment

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[22] Mr. Marshall valued the operating business and real estate separately. Because the valuation of the former necessarily "was already minority interest," Deposition at 848, the question is whether the real estate was similarly discounted for minority interest. It was not; however, the total value of the company was reduced by a 10 percent marketability discount. *Id.;* PX 107.

to these preliminary figures was the result of a subsequent application of a minority discount, rather than of pressure from U.S. News.

It appears to be true, however, that the figure at the lower end of the range communicated by Mr. Russell, $550, was already discounted. Plaintiffs contend that this figure was then improperly cut back, until the final value of $470 per share was arrived at. Yet, as a matter of law, none of the adjustments to the preliminary figure amount to fraudulent conduct.

First, plaintiffs challenge the way in which American Appraisal treated rent that U.S. News would have to pay for its headquarters. Instead of netting out these future rental payments against the income that U.S. News was to receive from the joint ventures, and then applying a minority discount to the result, as he had done previously, the appraiser discounted the income alone and then subtracted the full present value of the rent. Marshall Deposition (Aug. 9, 1984) at 656-57. Yet while this may not have been the best of appraisal procedures, there is absolutely nothing in the record to suggest that it was part of a scheme to deliberately defraud plaintiffs. The uncontroverted testimony of Mr. Marshall is that he believed that he was following correct appraisal methodology. Deposition at 659, 664-66. The fact that use of another procedure would have resulted in a higher value, standing alone, will not support a claim for securities fraud. To cross the threshold on such a claim, plaintiffs would have to make some showing that the conduct complained of was in some way "manipulative or deceptive" within the meaning of the securities laws. *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 474, 97 S.Ct. 1292, 1301, 51 L.Ed.2d 480 (1977). To the extent that the final treatment of the rental payments was disclosed in the appraisal report—which it was, *see* PX 21 at 25—the actions alleged as to U.S. News and American Appraisal could not be deemed deceptive. Nor can those actions be deemed "manipulative." "Ma-

nipulation" as a "term of art," *Santa Fe*, 430 U.S. at 476, 97 S.Ct. at 1302 (quoting *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199, 96 S.Ct. 1375, 1384, 47 L.Ed.2d 668 (1976)), "refers generally to practices . . . that are intended to mislead investors by artificially affecting market activity." *Id.* Even if the way in which the rental payments were ultimately treated was arrived at through some undisclosed process of negotiation, the end result—which was disclosed—could not have had the type of misleading or manipulative effect to which the securities laws are directed.

The second and third instances of misconduct alleged by plaintiffs offer even less support to their securities claim. They point to two adjustments to its methodology made by American Appraisal in order to maintain the per share value of $470, previously released in a draft report, in the face of a change proposed by Mr. Naimoli that would have increased the per share figure.[23] Yet because U.S. News suggested a change that would have *increased* the per share value, and because American Appraisal had no independent motive to depress the value of the U.S. News stock, it strains credulity to think that the adjustments made by American Appraisal give rise to any inference of fraud or collusion between that defendant and U.S. News.

While the Court is mindful that summary adjudication must not be used to resolve disputed issues of fact, it is also cognizant of the "integral" role of summary judgment in the Federal Rules in "secur[ing] the just, speedy and inexpensive determination of every action." *Celotex Corp. v. Catrett*, ___U.S. ___, 106 S.Ct. 2548, 2555, 91 L.Ed.2d 265 (1986) (quoting Fed.R.Civ.P. 1). In order to survive a

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[23] The adjustments were (1) an increase in the size of the minority discount from 33 to 35 per cent, Marshall Deposition at 653-54, and (2) the decision to give greater weight to one approach to valuing the real estate over the other, when the two were averaged to arrive at a final value for the real estate. *Id.* at 715-20.

motion for summary judgment, the nonmoving party must produce "sufficient evidence . . . for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, ___U.S. ___, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986); *see also Celotex*, 106 S.Ct. at 2552. If the evidence proffered by the nonmoving party is "merely colorable," or "not significantly probative," summary judgment may be granted. *Liberty Lobby*, 106 S.Ct. at 2511. In this proceeding, plaintiffs have suggested at best implausible bases to support their claim that U.S. News and American Appraisal conspired to deliberately suppress their retirement benefits by manipulation of the appraisal process. Accordingly, summary judgment is appropriate on this issue. *See Matsushita*, 106 S.Ct. at 1356-57.

COMMON-LAW FRAUD

To the extent that summary judgment is properly entered for defendants on plaintiffs' securities fraud claims, it is even more appropriate with respect to their claims for common-law fraud. In the District of Columbia, fraud must be proved by "clear and convincing evidence." *Blake Construction Co., Inc. v. C.J. Coakley, Co., Inc.*, 431 A.2d 569, 577 (D.C.1981). In the face of such a heightened evidentiary standard, the nonmoving party must, as the bearer of that burden of proof, demonstrate the existence of facts such as would enable a rational jury to conclude that that party had met its burden at trial. *Liberty Lobby*, 106 S.Ct. at 2513. In short, to survive defendants' motions, plaintiffs would have to come forward with sufficient material facts to warrant a finding by the Court that a rational jury could conclude that they had proved fraud by "clear and convincing evidence." *Id.* Yet as discussed *supra*, plaintiffs have utterly failed in this regard. Accordingly, summary, judgment is granted defendants on plaintiffs claims for common-law fraud, as well as their claims for securities fraud.

C.

CLAIMS FOR VIOLATIONS OF ERISA

Plaintiffs' ERISA claims straddle the dividing line between those of their claims premised upon fraudulent conduct and those premised upon merely negligent, imprudent, or arbitrary conduct. Clearly, a claim under ERISA § 502(a)(1)(B) falls into the latter category.[24] Plaintiffs' claim under section 502(a)(3), as noted, appears to be bifurcated into a claim sharing the same factual predicates as their claims for securities and common-law fraud, on the one hand, and their claim under section 502(a)(1)(B) and for negligence, on the other.

1. Section 502(a)(1)(B) claims

The Plan has not moved for summary judgment on the merits as to the sole claim against it. Moreover, counsel for the Plan has consistently conceded in oral argument that the propriety of the appraisal methodology employed is not an issue that may properly be resolved on summary judgment. *See, e.g.*, Transcript of Proceedings (May 13, 1986) at 56-59. Accordingly, a determination of whether the 1981 year-end appraisal was so erroneous as to support a claim for benefits due under ERISA § 502(a)(1)(B) must await trial.

2. Section 502(a)(3) claims

Insofar as plaintiffs rely upon allegations of intentional wrongdoing, as pressed in connection with their claims for securities and common-law fraud, to support a claim for breach of fiduciary duty under ERISA § 502(a)(3), they have tied the success of the latter claim to proof of fraudulent conduct. Hence, their claim under section 502(a)(3) is no stronger than their claims for securities or common-law fraud and must necessarily suffer the same fate.

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[24] *See supra* at 599.

Accordingly, to the extent that plaintiffs seek to support their claim under ERISA § 502(a)(3) by proof of the same facts adduced to support their claims for securities and common-law fraud, summary judgment is granted defendants.

However, while plaintiffs have apparently not sought to predicate liability for breach of fiduciary duty under section 502(a)(3) on the failure of U.S. News and the directors to adequately scrutinize the appraisal, *see* Second Amended Complaint ¶ 56-59, Memorandum of Points and Authorities in Opposition to the Motions for Summary Judgment of Defendants . . ., at 39-40, such a theory would be supported by case law, *see Fink v. Nat'l Savings & Trust Co.*, 772 F.2d 951, 955-56 (D.C.Cir.1985); *Donovan v. Cunningham*, 716 F.2d 1455, 1467-74 (5thCir.1983), *cert. denied*, 467 U.S. 1251, 104 S.Ct. 3533, 82 L.Ed.2d 839 (1984), and may not be unreasonable as applied to the record in this case. Accordingly, should the evidence developed at trial warrant it, plaintiffs may be granted leave to amend their complaint in conformity to that evidence, pursuant to Fed.R.Civ.P. 15(b).

D.

COMMON-LAW CLAIMS

1. Breach of fiduciary duty

Plaintiffs' claim that U.S. News and its directors breached common-law fiduciary duties owed them seems to be predicated upon an allegation that they wrongfully concealed and used "inside" information as to the value of the Company's assets, to the detriment of the U.S. News employees. *See* Second Amended Complaint ¶¶ 70, 73. As discussed earlier[25] there is no record evidence that defendants concealed relevant information as to the value

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[25] *See supra* at 602-604.

of U.S. News' assets, which presumably means its real estate holdings. Moreover, it is unclear how defendants could have used that information to the detriment of plaintiffs, unless reference is being made to plaintiffs' theory that the directors "secretly" intended to sell the Company. But again, as discussed previously,[26] the record simply does not support such a theory.

Accordingly, summary judgment will be granted defendants as to plaintiffs' claim for common-law breach of fiduciary duty.

2. Unjust enrichment

Plaintiffs' claim that U.S. News and the directors were unjustly enriched through their "willful[ ] fail[ure] to appraise annually the true value of the assets of U.S. News and its subsidiaries," Second Amended Complaint ¶ 77, seems to be no more than a restatement of their claims for securities and common-law fraud. Accordingly, consistent with the disposition of those claims, *supra*, defendants will be granted summary judgment as to plaintiffs' claim for unjust enrichment.

3. Negligence

Plaintiffs' negligence claim is premised upon two breaches of duty.[27] First, U.S. News and the directors are said to have failed to apprise American Appraisal of information relating to the proper valuation of the Company's assets, presumably meaning its real estate. Second Amended Complaint ¶ 82. Yet as discussed,[28] there is ab-

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[26] *See supra* at 604-605.

[27] American Appraisal is also said to have breached its duty to competently conduct the appraisal. Second Amended Complaint ¶¶ 86-87. However, as noted *supra* at 598-599 & note 6, consistent with the Court's Opinion in *Foltz*, no negligence claim is currently being asserted against American Appraisal.

[28] *See supra* at 603-604.

solutely no record evidence to support a claim that those defendants failed to provide American Appraisal with all relevant information. Second, U.S. News and the directors are said to have failed to scrutinize adequately the appraisal process. Second Amended Complaint ¶ 81. That claim may have some merit and would be analogous to a claim that those defendants breached their fiduciary duty of care under ERISA § 404(a).

Accordingly, defendants will be granted summary judgment as to plaintiffs' negligence claim, but only insofar as that claim is premised upon defendants' failure to furnish American Appraisal with information relevant to a valuation of the U.S. News real estate holdings.

CONCLUSION

For the reasons set forth above, defendants' motions are granted in part, but only as to the following plaintiffs, claims, or factual issues, as specified herein:

A. Statute of Limitations

The claims of plaintiffs Haller, LeCompte, Stifel, Strube and Truitt for benefits due under ERISA § 502(a)(1)(B), for breach of the fiduciary duty of care under ERISA § 502(a)(3), and for negligence are time-barred.

B. Securities and Common-law Fraud

Defendants' motions are granted as to all plaintiffs' claims for securities and common-law fraud.

C. ERISA

Plaintiffs' claims under ERISA § 502(a)(1)(B), *to the extent that they are not time-barred,* may proceed to trial. Summary judgment is granted defendants as to all plaintiffs' claims under ERISA § 502(a)(3), *except* insofar as those claims are premised upon a breach by U.S. News and the director-defendants of their duty to scrutinize adequately the appraisal.

D. Common-law Claims

1. Breach of fiduciary duty

Summary judgment is granted defendants on all plaintiffs' claims for common-law breach of fiduciary duty.

2. Unjust enrichment

Summary judgment is granted defendants as to all plaintiffs' claims for unjust enrichment.

3. Negligence

Summary judgment is granted defendants on all plaintiffs' negligence claims, *except* insofar as they are premised upon the failure of U.S. News and the director-defendants to scrutinize adequately the appraisal.

An appropriate Order will be entered.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action
No. 84-0447
(Parker, J.)

CHARLES S. FOLTZ, *et al.*,

Plaintiffs,

v.

U.S. NEWS & WORLD REPORT, INC., *et al.*,

Defendants.

FILED
JAN 9, 1987

ORDER

The Court, having considered the additional motion to dismiss pursuant to Fed. R. Civ. P. 41(b) certain claims against Stone, Dunn, Tanzer, Tuohey, Naimoli and McIlhenny, the memorandum in support of that motion, the response of plaintiffs thereto, and having heard oral argument on same, finds that upon the facts and the law plaintiffs have shown no right to relief with regard to the matters raised in that motion.

THEREFORE, it is

ORDERED that all claims against defendant Stone asserted on behalf of plaintiffs whose claims arose prior to January, 1975, when Stone commenced service as a director, are hereby dismissed;

FURTHER ORDERED that all claims against defendant Dunn asserted on behalf of plaintiffs whose claims arose prior to February 1975, when Dunn commenced service as a director, are hereby dismissed;

FURTHER ORDERED that all claims against defendant Tanzer asserted on behalf of plaintiffs whose claims arose prior to January, 1979, when Tanzer commenced service as a director, are hereby dismissed;

FURTHER ORDERED that all claims against defendant Tuohey asserted on behalf of plaintiffs whose claims arose prior to February, 1979, when Tuohey commenced service as a director, are hereby dismissed;

FURTHER ORDERED that all claims against defendant Naimoli asserted on behalf of plaintiffs whose claims arose prior to May 1980, when Naimoli commenced service as a director, are hereby dismissed;

FURTHER ORDERED that all claims against defendant McIlhenny asserted on behalf of plaintiffs whose claims arose prior to August 1980, when McIlhenny commenced service as a director, are hereby dismissed.

/s/ Barrington D. Parker
U.S.D.J.

Dated: January 8th, 1987

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1988

No. 87-7151
CA 84-00447

CHARLES S. FOLTZ, *et al.*

Appellants,

v.

U.S. NEWS & WORLD REPORT, INC., *et al.*
and Consolidated Cases

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
FILED MAR 14 1989
CONSTANCE L. DUPRE
CLERK

BEFORE: Edwards, Buckley and Williams, Circuit Judges

O R D E R

Upon consideration of appellants' petition for rehearing, filed February 13, 1989, it is

ORDERED, by the Court, that the petition is denied.

FOR THE COURT:
CONSTANCE L. DUPRE,
CLERK
BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1988

No. 87-7151

CA 84-00447

CHARLES S. FOLTZ, *et al.*

Appellants,

v.

U.S. NEWS & WORLD REPORT, INC., *et al.*
and Consolidated Cases

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
FILED MAR 14 1989
CONSTANCE L. DUPRE
CLERK

BEFORE: Wald, Chief Judge; Robinson, Mikva, Edwards, Ruth G. Ginsburg, Starr, Silberman, Buckley, Williams, D. H. Ginsburg and Sentelle, Circuit Judges

O R D E R

Appellants' Suggestion For Rehearing *En Banc* has been circulated to the full court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court *en banc*, that the suggestion is denied.

FOR THE COURT:
CONSTANCE L. DUPRE,
CLERK

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

Chief Judge Wald and Circuit Judge Robinson did not participate in this matter.

APPENDIX D
Statutory and Regulatory Provisions Involved

1. Employee Retirement Income Security Act of 1974 29 U.S.C.

§ 1001. Congressional findings and declaration of policy

(a) Benefit plans as affecting interstate commerce and the Federal taxing power

The Congress finds that the growth in size, scope, and numbers of employee benefit plans in recent years has been rapid and substantial; that the operational scope and economic impact of such plans is increasingly interstate; that the continued well-being and security of millions of employees and their dependents are directly affected by these plans; that they are affected with a national public interest; that they have become an important factor affecting the stability of employment and the successful development of industrial relations; that they have become an important factor in commerce because of the interstate character of their activities, and of the activities of their participants, and the employers, employee organizations, and other entities by which they are established or maintained; that a large volume of the activities of such plans is carried on by means of the mails and instrumentalities of interstate commerce; that owing to the lack of employee information and adequate safeguards concerning their operation, it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and the free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; that they substantially affect the revenues of the United States because they are afforded preferential Federal tax treatment; that despite the enormous growth in such plans many employees with long years of employment are losing anticipated retirement benefits owing to the lack of vesting provisions in such plans; that owing to the inadequacy of

current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits; and that it is therefore desirable in the interests of employees and their beneficiaries, for the protection of the revenue of the United States, and to provide for the free flow of commerce, that minimum standards be provided assuring the equitable character of such plans and their financial soundness.

(b) Protection of interstate commerce and beneficiaries by requiring disclosure and reporting, setting standards of conduct, etc., for fiduciaries

It is hereby declared to be the policy of this chapter to protect interstate commerce and the interests of participants in employee benefit plans and their beneficiaries, by requiring the disclosure and reporting to participants and beneficiaries of financial and other information with respect thereto, by establishing standards of conduct, responsibility, and obligation for fiduciaries of employee benefit plans, and by providing for appropriate remedies, sanctions, and ready access to the Federal courts.

(c) Protection of interstate commerce, the Federal taxing power, and beneficiaries by vesting of accrued benefits, setting minimum standards of funding, requiring termination insurance

It is hereby further declared to be the policy of this chapter to protect interstate commerce, the Federal taxing power, and the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to vest the accrued benefits of employees with significant periods of service, to meet minimum standards of funding, and by requiring plan termination insurance.

§ 1002. Definitions

For purposes of this subchapter:

* * * *

(2)(A) Except as provided in subparagraph (B), the terms "employee pension benefit plan" and "pension plan" means any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that by its express terms or as a result of surrounding circumstances such plan, fund, or program—

(i) provides retirement income to employees, or

(ii) results in a deferral of income by employees for periods extending to the termination of covered employment or beyond,

regardless of the method of calculating the contributions made to the plan, the method of calculating the benefits under the plan or the method of distributing benefits from the plan.

* * * *

(18) The term "adequate consideration" when used in part 4 of subtitle B of this subchapter means (A) in the case of a security for which there is a generally recognized market, either (i) the price of the security prevailing on a national securities exchange which is registered under section 78f of Title 15, or (ii) if the security is not traded on such a national securities exchange, a price not less favorable to the plan than the offering price for the security as established by the current bid and asked prices quoted by persons independent of the issuer and of any party in interest; and (B) in the case of an asset other than a security for which there is a generally recognized market, the fair market value of the asset as determined in good faith by the trustee or named fiduciary pursuant to the terms of the plan and in accordance with regulations promulgated by the Secretary.

* * * *

(26) The term "current value" means fair market value where available and otherwise the fair value as determined in good faith by a trustee or a named fiduciary (as defined in section 1102(a)(2) of this title) pursuant to the terms of the plan and in accordance with regulations of the Secretary, assuming an orderly liquidation at the time of such determination.

* * * *

(34) The terms "individual account plan" or "defined contribution plan" means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such particpant's account.

* * * *

§ 1023. Annual reports

(a) Publication and filing

* * * *

(b) Financial statement

An annual report under this section shall include a financial statement containing the following information:

(1) With respect to an employee welfare benefit plan: a statement of assets and liabilities; a statement of changes in fund balance; and a statement of changes in financial position. In the notes to financial statements, disclosures concerning the following items shall be considered by the accountant: a description of the plan including any significant changes in the plan made during the period and the impact of such changes on benefits; a description of material lease commitments, other commitments, and contingent liabilities; a description of agreements and transactions with persons known to be parties in interest; a general description of priorities upon termination of the

plan; information concerning whether or not a tax ruling or determination letter has been obtained; and any other matters necessary to fully and fairly present the financial statements of the plan.

* * * *

(3) With respect to all employee benefit plans, the statement required under paragraph (1) or (2) shall have attached the following information in separate schedules:

(A) a statement of the assets and liabilities of the plan aggregated by categories and valued at their current value, and the same data displayed in comparative form for the end of the previous fiscal year of the plan;

(B) a statement of receipts and disbursements during the preceding twelve-month period aggregated by general sources and applications;

(C) a schedule of all assets held for investment purposes aggregated and identified by issuer, borrower, or lessor, or similar party to the transaction (including a notation as to whether such party is known to be a party in interest), maturity date, rate of interest, collateral, par or maturity value, cost, and current value;

* * * *

§ 1024. Filing and furnishing of information

(a) Filing of annual report, plan description, summary plan description, and modifications and changes with Secretary

(1) The administrator of any employee benefit plan subject to this part shall file with the Secretary—

(A) the annual report for a plan year within 210 days after the close of such year (or within such time as may be required by regulations promulgated by the Secretary in order to reduce duplicative filing);

(B) the plan description within 120 days after such plan becomes subject to this part and an updated plan description, no more frequently than once every 5 years, as the Secretary may require;

(C) a copy of the summary plan description at the time such summary plan description is required to be furnished to participants and beneficiaries pursuant to subsection (b)(1)(B) of this section; and

(D) modifications and changes referred to in section 1022(a)(2) of this title within 60 days after such modifications or change is adopted or occurs, as the case may be.

The Secretary shall make copies of such plan descriptions, summary plan descriptions, and annual reports available for inspection in the public document room of the Department of Labor. The administrator shall also furnish to the Secretary, upon request, any documents relating to the employee benefit plan, including but not limited to the bargaining agreement, trust agreement, contract, or other instrument under which the plan is established or operated.

* * * *

(b) Publication of summary plan description and annual report to participants and beneficiaries of plan

Publication of the summary plan descriptions and annual reports shall be made to participants and beneficiaries of the particular plan as follows:

(1) The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, a copy of the summary, plan description, and all modifications and changes referred to in section 1022(a)(1) of this title—

(A) within 90 days after he becomes a participant, or (in the case of a beneficiary) within 90 days after he first receives benefits, or

(B) if later, within 120 days after the plan becomes subject to this part.

The administrator shall furnish to each participant, and each beneficiary receiving benefits under the plan, every fifth year after the plan becomes subject to this part an updated summary plan description described in section 1022 of this title which integrates all plan amendments made within such five-year period, except that in a case where no amendments have been made to a plan during such five-year period this sentence shall not apply. Notwithstanding the foregoing, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the plan, the summary plan description described in section 1022 of this title every tenth year after the plan becomes subject to this part. If there is a modification or change described in section 1022(a)(1) of this title, a summary description of such modification or change shall be furnished not later than 210 days after the end of the plan year in which the change is adopted to each participant, and to each beneficiary who is receiving benefits under the plan.

(2) The administrator shall make copies of the plan description and the latest annual report and the bargaining agreement, trust agreement, contract, or other instruments under which the plan was established or is operated available for examination by any plan participant or beneficiary in the principal office of the administrator and in such other places as may be necessary to make available all pertinent information to all participants (including such places as the Secretary may prescribe by regulations).

(3) Within 210 days after the close of the fiscal year of the plan, the administrator shall furnish to each participant, and to each beneficiary receiving benefits under the

plan, a copy of the statements and schedules, for such fiscal year, described in subparagraphs (A) and (B) of section 1023(b)(3) of this title and such other material as is necessary to fairly summarize the latest annual report.

(4) The administrator shall, upon written request of any participant or beneficiary, furnish a copy of the latest updated summary plan description, plan description, and the latest annual report, any terminal report, the bargaining agreement, trust agreement, contract, or other instruments under which the plan is established or operated. The administrator may make a reasonable charge to cover the cost of furnishing such complete copies. The Secretary may by regulation prescribe the maximum amount which will constitute a reasonable charge under the preceding sentence.

§ 1082. **Minimum funding standards**

(a) Avoidance of accumulated funding deficiency

(1) Every employee pension benefit plan subject to this part shall satisfy the minimum funding standard (or the alternative minimum funding standard under section 1085 of this title) for any plan year to which this part applies. A plan to which this part applies shall have satisfied the minimum funding standard for such plan for a plan year if as of the end of such plan year the plan does not have an accumulated funding deficiency.

* * * *

(b) Funding standard account

* * * *

(c) Methods

(2)(A) For purposes of this part, the value of the plan's assets shall be determined on the basis of any reasonable actuarial method of valuation which takes into account fair market value and which is permitted under regulations prescribed by the Secretary of the Treasury.

§ 1103. Establishment of trust

(a) Benefit plan assets to be held in trust; authority of trustees

Except as provided in subsection (b) of this section, all assets of an employee benefit plan shall be held in trust by one or more trustees. Such trustee or trustees shall be either named in the trust instrument or in the plan instrument described in section 1102(a) of this title or appointed by a person who is a named fiduciary, and upon acceptance of being named or appointed, the trustee or trustees shall have exclusive authority and discretion to manage and control the assets of the plan, except to the extent that—

(1) the plan expressly provides that the trustee or trustees are subject to the direction of a named fiduciary who is not a trustee, in which case the trustees shall be subject to proper directions of such fiduciary which are made in accordance with the terms of the plan and which are not contrary to this chapter, or

(2) authority to manage, acquire, or dispose of assets of the plan is delegated to one or more investment managers pursuant to section 1102(c)(3) of this title.

(b) Exceptions

* * * *

(c) Assets of plan not to inure to benefit of employer; allowable purposes of holding plan assets

(1) Except as provided in paragraph (2), (3), or (4) or subsection (d) of this section, or under sections 1342 and 1344 of this title (relating to termination of insured plans), the assets of a plan shall never inure to the benefit of any employer and shall be held for the exclusive purposes of providing benefits to participants in the plan and their

beneficiaries and defraying reasonable expenses of administering the plan.

§ 1104. Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims;

(C) by diversifying the investments of the plan so as to minimize the risk of large losses, unless under the circumstances it is clearly prudent not to do so; and

(D) in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of this subchapter or subchapter III of this chapter.

(2) In the case of an eligible individual account plan (as defined in section 1107(d)(3) of this title), the diversification requirement of paragraph (1)(C) and the prudence requirement (only to the extent that it requires diversification) of paragraph (1)(B) is not violated by acquisition or holding of qualifying employer real property or qualifying employer

securities (as defined in section 1107(d)(4) and (5) of this title).

§ 1106. Prohibited transactions

(a) Transactions between plan and party in interest

Except as provided in section 1108 of this title:

(1) A fiduciary with respect to a plan shall not cause the plan to engage in a transaction, if he knows or should know that such transaction constitutes a direct or indirect—

(A) sale or exchange, or leasing, of any property between the plan and a party in interest;

(B) lending of money or other extension of credit between the plan and a party in interest;

(C) furnishing of goods, services, or facilities between the plan and a party in interest;

(D) transfer to, or use by or for the benefit of, a party in interest, of any assets of the plan; or

(E) acquisition, on behalf of the plan, of any employer security or employer real property in violation of section 1107(a) of this title.

(2) No fiduciary who has authority or discretion to control or manage the assets of a plan shall permit the plan to hold any employer security or employer real property if he knows or should know that holding such security or real property violates section 1107(a) of this title.

(b) Transactions between plan and fiduciary

A fiduciary with respect to a plan shall not—

(1) deal with the assets of the plan in his own interest or for his own account,

(2) in his individual or in any other capacity act in any transaction involving the plan on behalf of a party (or represent a party) whose interests are adverse to the interests of the plan or the interests of its participants or beneficiaries, or

(3) receive any consideration for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.

(c) Transfer of real or personal property to plan by party in interest

A transfer of real or personal property by a party in interest to a plan shall be treated as a sale or exchange if the property is subject to a mortgage or similar lien which the plan assumes or if it is subject to a mortgage or similar lien which a party-in-interest placed on the property within the 10-year period ending on the date of the transfer.

§ 1107. Limitation with respect to acquisition and holding of employer securities and employer real property by certain plans

(a) Percentage limitation

Except as otherwise provided in this section and section 1114 of this title:

(1) A plan may not acquire or hold—

(A) any employer security which is not a qualifying employer security, or

(B) any employer real property which is not qualifying employer real property.

(2) A plan may not acquire any qualifying employer security or qualifying employer real property, if immediately after such acquisition the aggregate fair

market value of employer securities and employer real property held by the plan exceeds 10 percent of the fair market value of the assets of the plan.

(3)(A) After December 31, 1984, a plan may not hold any qualifying employer securities or qualifying employer real property (or both) to the extent that the aggregate fair market value of such securities and property determined on December 31, 1984, exceeds 10 percent of the greater of—

(i) the fair market value of the assets of the plan, determined on December 31, 1984, or

(ii) the fair market value of the assets of the plan determined on January 1, 1975.

(B) Subparagraph (A) of this paragraph shall not apply to any plan which on any date after December 31, 1974; and before January 1, 1985, did not hold employer securities or employer real property (or both) the aggregate fair market value of which determined on such date exceeded 10 percent of the greater of

(i) the fair market value of the assets of the plan, determined on such date, or

(ii) the fair market value of the assets of the plan determined on January 1, 1975.

(4)(A) After December 31, 1979, a plan may not hold any employer securities or employer real property in excess of the amount specified in regulations under subparagraph (B). This subparagraph shall not apply to a plan after the earliest date after December 31, 1974, on which it complies with such regulations.

(B) Not later than December 31, 1976, the Secretary shall prescribe regulations which shall have the effect of requiring that a plan divest itself of 50 percent of the holdings of employer securities and em-

ployer real property which the plan would be required to divest before January 1, 1985, under paragraph (2) or subsection (c) of this section (whichever is applicable).

(b) Exception

(1) Subsection (a) of this section shall not apply to any acquisition or holding of qualifying employer securities or qualifying employer real property by an eligible individual account plan.

(2) Cross References

(A) For exemption from diversification requirements for holding of qualifying employer securities and qualifying employer real property by eligible individual account plans, see section 1104(a)(2) of this title.

(B) For exemption from prohibited transactions for certain acquisitions of qualifying employer securities and qualifying employer real property which are not in violation of 10 percent limitation, see section 1108(e) of this title.

(C) For transitional rules respecting securities or real property subject to binding contracts in effect on June 30, 1974, see section 1114(c) of this title.

(c) Election

(1) A plan which makes the election, under paragraph (3) shall be treated as satisfying the requirement of subsection (a)(3) of this section if and only if employer securities held on any date after December 31, 1974 and before January 1, 1985 have a fair market value, determined as of December 31, 1974, not in excess of 10 percent of the lesser of—

(A) the fair market value of the assets of the plan determined on such date (disregarding any portion of

the fair market value of employer securities which is attributable to appreciation of such securities after December 31, 1974) but not less than the fair market value of plan assets on January 1, 1975, or

(B) an amount equal to the sum of (i) the total amount of the contributions to the plan received after December 31, 1974, and prior to such date, plus (ii) the fair market value of the assets of the plan, determined on January 1, 1975.

(2) For purposes of this subsection, in the case of an employer security held by a plan after January 1, 1975, the ownership of which is derived from ownership of employer securities held by the plan on January 1, 1975, or from the exercise of rights derived from such ownership, the value of such security held after January 1, 1975, shall be based on the value as of January 1, 1975, of the security from which ownership was derived. The Secretary shall prescribe regulations to carry out this paragraph.

(3) An election under this paragraph may not be made after December 31, 1975. Such an election shall be made in accordance with regulations prescribed by the Secretary, and shall be irrevocable. A plan may make an election under this paragraph only if on January 1, 1975, the plan holds no employer real property. After such election and before January 1, 1985 the plan may not acquire any employer real property.

(d) Definitions

For purposes of this section—

(1) The term "employer security" means a security issued by an employer of employees covered by the plan, or by an affiliate of such employer. A contract to which section 1108(b)(5) of this title applies shall not be treated as a security for purposes of this section.

(2) The term "employer real property" means real property (and related personal property) which is leased to an employer of employees covered by the plan, or to an affiliate of such employer. For purposes of determining the time at which a plan acquires employer real property for purposes of this section, such property shall be deemed to be acquired by the plan on the date on which the plan acquires the property or on the date on which the lease to the employer (or affiliate) is entered into, whichever is later.

(3)(A) The term "eligible individual account plan" means an individual account plan which is (i) a profit-sharing, stock bonus, thrift, or savings plan; (ii) an employee stock ownership plan; or (iii) a money purchase plan which was in existence on September 2, 1974, and which on such date invested primarily in qualifying employer securities. Such term excludes an individual retirement account or annuity described in section 408 of Title 26.

(B) Notwithstanding subparagraph (A), a plan shall be treated as an eligible individual account plan with respect to the acquisition or holding of qualifying employer real property or qualifying employer securities only if such plan explicitly provides for acquisition and holding of qualifying employer securities or qualifying employer real property (as the case may be). In the case of a plan in existence on September 2, 1974, this subparagraph shall not take effect until January 1, 1976.

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[Added by 1987 Amendment]

(C) The term "eligible individual account plan" does not include any individual account plan the benefits of which are taken into account in determining the

benefits payable to a participant under any defined benefit plan.

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(4) The term "qualifying employer real property" means parcels of employer real property—

(A) if a substantial number of the parcels are dispersed geographically;

(B) if each parcel of real property and the improvements thereon are suitable (or adaptable without excessive cost) for more than one use;

(C) even if all of such real property is leased to one lessee (which may be an employer, or an affiliate of an employer); and

(D) if the acquisition and retention of such property comply with the provisions of this part (other than section 1104(a)(1)(B) of this title to the extent it requires diversification, and sections 1104(a)(1)(C), 1106 of this title, and subsection (a) of this section).

(5) The term "qualifying employer security" means an employer security which is stock or a marketable obligation (as defined in subsection (e) of this section).

[Amended 1987]

(5) The term "qualifying employer security" means an employer security which is stock or a marketable obligation (as defined in subsection (e) of this section). After December 17, 1987, in the case of a plan other than an eligible individual account plan, stock shall be considered a qualifying employer security only if such stock satisfies the requirements of subsection (f)(1) of this section.

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(6) The term "employee stock ownership plan" means an individual account plan—

(A) which is a stock bonus plan which is qualified, or a stock bonus plan and money purchase both of which are qualified, under section 401 of Title 26, and which is designed to invest primarily in qualifying employee securities, and

(B) which meets such other requirements as the Secretary of the Treasury may prescribe by regulation.

(7) A corporation is an affiliate of an employer if it is a member of any controlled group of corporations (as defined in section 1563(a) of Title 26, except that "applicable percentage" shall be substituted for "80 percent" wherever the latter percentage appears in such section) of which the employer who maintains the plan is a member. For purposes of the preceding sentence, the term "applicable percentage" means 50 percent, or such lower percentage as the Secretary may prescribe by regulation. A person other than a corporation shall be treated as an affiliate of an employer to the extent provided in regulations of the Secretary. An employer which is a person other than a corporation shall be treated as affiliated with another person to the extent provided by regulations of the Secretary. Regulations under this paragraph shall be prescribed only after consultation and coordination with the Secretary of the Treasury.

(8) The Secretary may prescribe regulations specifying the extent to which conversions, splits, the exercise of rights, and similar transactions are not treated as acquisitions.

[Added by 1987 Amendment]

(9) For purposes of this section, an arrangement which consists of a defined benefit plan and an individual account plan shall be treated as 1 plan if benefits of such arrangement are taken into account in determining the benefits payable under such defined benefit plan.

(e) Marketable Obligations

* * * *

[Added by 1987 Amendment]

(f) Maximum percentage of stock held by plan; time of holding or acquisition; necessity of legally binding contract

(1) Stock satisfies the requirements of this subsection if—

(A) no more than 25 percent of the aggregate amount of stock of the same class issued and outstanding at the time of acquisition is held by the plan, and

(B) at least 50 percent of the aggregate amount referred to in subparagraph (A) is held by persons independent of the issuer.

(2) Until January 1, 1993, a plan shall not be treated as violating subsection (a) of this section solely by holding stock which fails to satisfy the requirements of paragraph (1) if such stock—

(A) has been so held since December 17, 1987, or

(B) was acquired after December 17, 1987, pursuant to a legally binding contract in effect on December 17, 1987, and has been so held at all times after the acquisition.

(3) After December 17, 1987, no plan may acquire stock which does not satisfy the requirements of paragraph (1) unless the acquisition is made pursuant to a legally binding contract in effect on such date.

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§ 1108. Exemptions from prohibited transactions

(a) Grant of exemptions

The Secretary shall establish an exemption procedure for purposes of this subsection. Pursuant to such procedure, he may grant a conditional or unconditional exemption of any fiduciary or transaction, or class of fiduciaries or transactions, from all or part of the restrictions imposed by sections 1106 and 1107(a) of this title. Action under this subsection may be taken only after consultation and coordination with the Secretary of the Treasury. An exemption granted under this section shall not relieve a fiduciary from any other applicable provision of this chapter. The Secretary may not grant an exemption under this subsection unless he finds that such exemption is—

(1) administratively feasible,

(2) in the interest of the plan and of its participants and beneficiaries, and

(3) protective of the rights of participants and beneficiaries of such plan.

Before granting an exemption under this subsection from section 1106(a) or 1107(a) of this title, the Secretary shall publish notice in the Federal Register of the pendency of the exemption, shall require that adequate notice be given to interested persons, and shall afford interested persons opportunity to present views. The Secretary may not grant an exemption under this subsection from section 1106(b) of this title unless he affords an opportunity for a hearing and makes a determination on the record with respect to

the findings required by paragraphs (1), (2), and (3) of this subsection.

(b) Enumeration of transactions exempted from section 1106 prohibitions

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(c) Fiduciary benefits and compensation not prohibited by section 1106

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(d) Owner-employees; family members; shareholder employees

* * * *

(e) Acquisition or sale by plan of qualifying employer securities; acquisition, sale, or lease by plan of qualifying employer real property

Sections 1106 and 1107 of this title shall not apply to the acquisition or sale by a plan of qualifying employer securities (as defined in section 1107(d)(5) of this title) or acquisition, sale or lease by a plan of qualifying employer real property (as defined in section 1107(d)(4) of this title)—

(1) if such acquisition, sale, or lease is for adequate consideration (or in the case of a marketable obligation, at a price not less favorable to the plan than the price determined under section 1107(e)(1) of this title),

(2) if no commission is charged with respect thereto, and

(3) if—

(A) the plan is an eligible individual account plan (as defined in section 1107(d)(3) of this title), or

(B) in the case of an acquisition or lease of qualifying employer real property by a plan which is

not an eligible individual account plan, or of an acquisition of qualifying employer securities by such a plan, the lease or acquisition is not prohibited by section 1107(a) of this title.

(f) Applicability of statutory prohibitions to mergers or transfers

* * * *

§ 1109. Liability for breach of fiduciary duty

(a) Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary. A fiduciary may also be removed for a violation of section 1111 of this title.

(b) No fiduciary shall be liable with respect to a breach of fiduciary duty under this subchapter if such breach was committed before he became a fiduciary or after he ceased to be a fiduciary.

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

* * * *

2. Treasury Regulations 26 C.F.R.

§ 1.412(c)(2)-1 Valuation of plan assets; reasonable actuarial valuation methods.

(a) *Introduction*—(1) *In general.* This section prescribes rules for valuing plan assets under an actuarial valuation method which satisfies the requirements of section 412(c)(2)(A). An actuarial valuation method is a funding method within the meaning of section 412(c)(3) and the regulations thereunder. Therefore, certain changes affecting the actuarial valuation method are identified in this section as changes in a plan's funding method.

(b) *Asset valuation method requirements*—(1) *Consistent basis.* (i) The actuarial asset valuation method must be

applied on a consistent basis. Any change in meeting the requirements of this paragraph (b) is a change in funding method subject to section 412(c)(5).

(4) *Reflect fair market value.* The valuation method must take into account fair market value by making use of the—

(i) Fair market value (determined under paragraph (c) of this section), or

(ii) Average value (determined under paragraph (b)(7) of this section) of the plan's assets as of the applicable asset valuation date. This is done either directly in the computation of their actuarial value or indirectly in the computation of upper or lower limits placed on that value.

(c) *Fair market value of assets*—(1) *General rules.* Except as otherwise provided in this paragraph (c), the fair market value of a plan's assets for purposes of this section is the price at which the property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or sell and both having reasonable knowledge of relevant facts.

§ 20.2031-2 Valuation of stocks and bonds.

(a) *In general.* The value of stocks and bonds is the fair market value per share or bond on the applicable valuation date.

* * * *

(f) *Where selling prices or bid and asked prices are unavailable.* If the provisions of paragraphs (b), (c), and (d) of this section are inapplicable because actual sale prices and bona fide bid and asked prices are lacking, then the fair market value is to be determined by taking the following factors into consideration:

(1) In the case of corporate or other bonds, the soundness of the security, the interest yield, the date of maturity, and other relevant factors; and

(2) In the case of shares of stock, the company's net worth, prospective earning power and dividend-paying capacity, and other relevant factors.

Some of the "other relevant factors" referred to in subparagraph (1) and (2) of this paragraph are: The good will of the business; the economic outlook in the particular industry; the company's position in the industry and its management; *the degree of control of the business represented by the block of stock to be valued*; and the values of securities of corporations engaged in the same or similar lines of business which are listed on a stock exchange. However, the weight to be accorded such comparisons or any other evidentiary factors considered in the determination of a value depends upon the facts of each case. In addition to the relevant factors described above, consideration shall also be given to nonoperating assets, including proceeds of life insurance policies payable to or for the benefit of the company, to the extent such nonoperating assets have not been taken into account in the determination of net worth, prospective earning power and dividend-earning capacity. Complete financial and other data upon which the valuation is based should be submitted with the return, including copies of reports of any examinations of the company made by accountants, engineers, or any technical experts as of or near the applicable valuation date. (emphasis added)

3. P.B.G.C. Regulations 29 C.F.R.

PART 2620—VALUATION OF PLAN ASSETS

§ 2620.1 Purpose and scope.

(a) This part sets forth standards for valuing individual plan assets in connection with the PBGC's computation of plan asset sufficiency pursuant to section 4041(b) of the Act, and in connection with the PBGC's computation of the current value of plan assets pursuant to section 4062(b)(1)(B) of the Act.

(b) This part applies to all plans which are covered, as provided by § 4021 of the Act, and which terminate:

(1) After June 30, 1974 and before September 2, 1974 and which have complied with the requirements of § 4082(b) of the Act; or,

(2) On or after September 2, 1974.

§ 2620.2 Definitions.

"Fair market value" means the price at which property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge or relevant facts.

§ 2620.3 Valuation of plan assets.

Plan assets shall be valued at their fair market value on the valuation date, as defined in § 2620.4, based on the method of valuation which most accurately reflects such fair market value.

4. Revenue Rulings

Rev. Rul. 59-60

Section 1. Purpose.

The purpose of this Revenue Ruling is to outline and review in general the approach, methods and factors to be considered in valuing shares of the capital stock of closely held corporations for estate tax and gift tax purposes. The methods discussed herein will apply likewise to the valuation of corporate stocks on which market quotations are either unavailable or are of such scarcity that they do not reflect the fair market value.

Sec. 2. Background and Definitions

.01 All valuations must be made in accordance with the applicable provisions of the Internal Revenue Code of 1954 and the Federal Estate Tax and Gift Tax Regulations. Sections 2031(a), 2032 and 2512(a) of the 1954 Code (sections 811 and 1005 of the 1939 Code) require that the

property to be included in the gross estate, or made the subject of a gift, shall be taxed on the basis of the value of the property at the time of death of the decedent, the alternate date if so elected, or the date of gift.

.02 Section 20.2031-1(b) of the Estate Tax Regulations (section 81.10 of the Estate Tax Regulations 105) and section 25.2512-1 of the Gift Tax Regulations (section 86.19 of Gift Tax Regulations 108) define fair market value, in effect, as *the price at which the property would change hands between a willing buyer and a willing seller when the former is not under any compulsion to buy and the latter is not under any compulsion to sell, both parties having reasonable knowledge of relevant facts.* Court decisions frequently state in addition that the hypothetical buyer and seller are assumed to be able, as well as willing, to trade and to be well informed about the property and concerning the market for such property. (emphasis added)

.03 Closely held corporations are those corporations the shares of which are owned by a relatively limited number of stockholders. Often the entire stock issue is held by one family. The result of this situation is that little, if any, trading in the shares takes place. There is, therefore, no established market for the stock and such sales as occur at irregular intervals seldom reflect all of the elements of a representative transaction as defined by the term "fair market value."

Sec. 3. Approach to Valuation.

.01 A determination of fair market value, being a question of fact, will depend upon the circumstances in each case. No formula can be devised that will be generally applicable to the multitude of different valuation issues arising in estate and gift tax cases. Often, an appraiser will find wide differences of opinion as to the fair market value of a particular stock. In resolving such differences, he should maintain a reasonable attitude in recognition of the fact that valuation is not an exact science. A sound

valuation will be based upon all the relevant facts, but the elements of common sense, informed judgment and reasonableness must enter into the process of weighing those facts and determining their aggregate significance.

.02 The fair market value of specific shares of stock will vary as general economic conditions change from "normal" to "boom" or "depression," that is, according to the degree of optimism or pessimism with which the investing public regards the future at the required date of appraisal. Uncertainty as to the stability or continuity of the future income from a property decreases its value by increasing the risk of loss of earnings and value in the future. The value of shares of stock of a company with very uncertain future prospects is highly speculative. The appraiser must exercise his judgment as to the degree of risk attaching to the business of the corporation which issued the stock, but that judgment must be related to all of the other factors affecting value.

.03 Valuation of securities is, in essence, a prophesy as to the future and must be based on facts available at the required date of appraisal. As a generalization, the prices of stocks which are traded in volume in a free and active market by informed persons best reflect the consensus of the investing public as to what the future holds for the corporations and industries represented. When a stock is closely held, is traded infrequently, or is traded in an erratic market, some other measure of value must be used. In many instances, the next best measure may be found in the prices at which the stocks of companies engaged in the same or a similar line of business are selling in a free and open market.

Sec. 4. Factors To Consider.

.01 It is advisable to emphasize that in the valuation of the stock of closely held corporations or the stock of corporations where market quotations are either lacking or too scarce to be recognized, all available financial data, as

well as all relevant factors affecting the fair market value, should be considered. The following factors, although not all-inclusive are fundamental and require careful analysis in each case:

(a) The nature of the business and the history of the enterprise from its inception.

(b) The economic outlook in general and the condition and outlook of the specific industry in particular.

(c) The book value of the stock and the financial condition of the business.

(d) The earning capacity of the company.

(e) The dividend-paying capacity.

(f) Whether or not the enterprise has goodwill or other intangible value.

(g) Sales of the stock and *the size of the block of stock to be valued.* (emphasis added)

(h) The market price of stocks of corporations engaged in the same or a similar line of business having their stocks actively traded in a free and open market, either on an exchange or over-the-counter.

.02 The following is a brief discussion of each of the foregoing factors:

* * * *

(g) Sales of stock of a closely held corporation should be carefully investigated to determine whether they represent transactions at arm's length. Forced or distress sales do not ordinarily reflect fair market value nor do isolated sales in small amounts necessarily control as the measure of value. This is especially true in the valuation of a controlling interest in a corporation. Since, in the case of closely held stocks, no prevailing market prices are available, there is no basis for making an adjustment

for blockage. It follows, therefore, that such stocks should be valued upon a consideration of all the evidence affecting the fair market value. *The size of the block of stock itself is a relevant factor to be considered.* Although it is true that a minority interest in an unlisted corporation's stock is more difficult to sell than a similar block of listed stock, it is equally true that *control of a corporation, either actual or in effect, representing as it does an added element of value, may justify a higher value for a specific block of stock.* (emphasis added)

* * * *

Rev. Rul. 70-125

Advice has been requested concerning the requirements for the allocation and valuation of trust funds under a qualified profit-sharing plan.

An employer established a profit-sharing plan intended to qualify under section 401(a) of the Internal Revenue Code of 1954. The plan contains a definite formula for crediting the employer's contributions to the accounts of the employee-participants. However, there is no specific provision for allocating trust earnings to participants' accounts or for the periodic valuation of trust investments.

Section 1.401-1(b)(1)(ii) of the Income Tax Regulations states that a profit-sharing plan must provide a definite predetermined formula for allocating the contributions made to the plan among the participants and for distributing the funds accumulated under the plan. Section 1.401-1(b)(1)(iii) of the regulations states that, for purposes of allocating and distributing the stock of the employer, a stock bonus plan is subject to the same requirements as a profit-sharing plan. A pension plan of the money purchase type provides for fixed contributions that are not geared to profits. See section 1.401-1(b)(1)(i) of the regulations. Contributions under such a pension plan are accumulated under the plan and, along with the earnings

thereon, distributed to participants in accordance with the terms of the plan.

Since qualified profit-sharing, stock bonus, and trusteed pension plans of the money purchase type are required to provide for distributions in accordance with amounts stated or ascertainable and credited to participants, all funds under such a trust must be allocated to participants in accordance with a definite formula. Thus, no reserves are to be established by withholding allocations from participants. If suspense accounts are maintained, provision is to be made for ascertaining the respective shares of participants in such accounts and such shares are to be included in the distribution.

Furthermore, if the amounts to be allocated or distributed to a particular participant are to be ascertainable, such plans must provide for a valuation of investments held by the trust, at least once a year, on a specified inventory date, in accordance with a method consistently followed and uniformly applied. *The fair market value on the inventory date is to be used for this purpose.* The respective accounts of participants are to be adjusted in accordance with the valuation. If, for example, as a result of a valuation on the inventory date, a participant's account is to be increased by one-tenth of one percent of the increase in the value of the total trust assets, and such increase is $50,000, his account is to be increased by $50. (emphasis added)

Under the plan in this case, trust earnings, unrealized changes in the value of trust investments, and losses realized on the sale of trust assets, may be allocated to participants accounts at infrequent or irregular intervals and different valuation methods may be used for different participants or for different trust investments. Therefore, the plan does not provide a definite formula for allocating and distributing the funds, as required by the regulations.

Accordingly, it is held that this plan does not qualify under section 401(a) of the Code.

Rev.Rul. 80-155

The purpose of this revenue ruling is to restate the position in Rev. Rul. 70-125, 1970-1 C.B. 87, and Rev. Rul. 71-27, 1971-1 C.B. 121, in view of the Employee Retirement Income Security Act of 1974, Pub. L. 93-406, 1974-3 C.B. 1.

The issue in Rev. Rul. 70-125 is whether a defined contribution plan that contains a definite formula for crediting the employer's contributions to the participants' accounts but with no specific provision for allocation of trust earnings to participants' accounts or for the periodic valuation of trust investments is a qualified plan under section 401(a) of the Internal Revenue Code.

The issue in Rev. Rul. 71-27 is whether a plan provision allowing interim valuations in addition to an annual valuation will result in a plan's disqualification.

Section 414(i) of the Code states that a defined contribution plan is a plan that provides for an individual account for each participant and for benefits based solely on the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.

Section 1.401-1(b)(1)(ii) of the Income Tax Regulations states that a profit-sharing plan must provide a definite predetermined formula for allocating the contributions made to the plan among the participants and for distributing the funds accumulated under the plan. Section 1.401-1(b)(1)(iii) states that, for purposes of allocating and distributing the stock of the employer, a stock bonus plan is subject to the same requirements as a profit-sharing plan.

A pension plan of the money purchase type provides for fixed contributions that are not geared to profits. See sec-

tion 1.401-1(b)(1)(i) of the regulations. Contributions under such a pension plan are accumulated under the plan and, along with the earnings thereon, distributed to participants in accordance with the terms of the plan.

Because profit-sharing, stock bonus and pension plans of the money purchase type (i.e., defined contribution plans) are required to provide for distributions in accordance with amounts stated or ascertainable and credited to participants, the funds under such a trust must be allocated to participants' accounts in accordance with a definite formula (although certain exceptions are allowed, such as the use of a suspense account in accordance with the requirements of section 415 of the Code).

Furthermore, if the amounts to be allocated or distributed to a particular participant are to be ascertainable, such plans must provide for a valuation of investments held by the trust, at least once a year, on a specified inventory date, in accordance with a method consistently followed and uniformly applied. *The fair market value on the inventory date is to be used for this purpose. The respective accounts* of participants are to be adjusted in accordance with the valuation. (emphasis added)

In the case of a plan in which trust earnings, unrealized changes in the value of trust investments, and losses realized on the sale of trust assets may be valued and allocated to participants' accounts at infrequent or irregular intervals or different valuation methods may be used for different participants, the plan does not provide a definite formula for allocating and distributing the funds, as required by the regulations.

Accordingly, such a plan does not qualify under section 401(a) of the Code.

However, a plan provision allowing interim valuations at the trustee's discretion in addition to a consistent annual valuation does not disqualify the plan so long as the

use of the interim valuations does not result in discrimination prohibited by section 401(a)(4) of the Code.

Rev. Ruls. 70-125 and 71-27 are superseded because the positions stated therein are restated under current law.